Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed July 2, 1997

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commission of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND AMENDED OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, presiding

Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995
Opinion Withdrawn December 27, 1996
Filed December 27, 1996
Amended April 3, 1997

Before: James R. Browning, Thomas M. Reavley*, and
William A. Norris, Circuit Judges.

Opinion by Judge Norris

ORDER

The opinion filed on December 27, 1996 [App. B] is amended as follows:

Add to the end of footnote 8 at slip op. at 16278 [App. B] the following two sentences:

> Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. *Cf.*

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* The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Ticor, 504 U.S. at 636-37 (first prong of *Midcal* test intended to ensure state has not acted through inadvertence).

Replace the first full paragraph at slip op. at 16298 [App B] with the following paragraph:

As for PGE's second argument, the only authority it cites is the 1972 Order stating that "[t]here can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customer," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

With the above amendments, the panel, as constituted above, has voted unanimously to deny the petition for rehearsing. Judge Browning has voted to reject the suggestion for a rehearing en banc, and Judges Reavley and Norris have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(B).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

OPINION

NORRIS, Circuit Judge:

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This appeal arises out of an antitrust action that Columbia Steel Casting Co., a large consumer of electric power in Portland, Oregon, brought against two electric utilities, Portland General Electric (PGE) and Pacific Power & Light (PP&L), charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act, 15 U.S.C.

§§ 1-2[1]. PGE raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission which, PGE argued, approved a division of the Portland market into exclusive service territories. *See Parker v. Brown*, 317 U.S. 341 (1943). The district court rejected this state-action immunity defense and awarded summary judgment to Columbia Steel. PGE appeals the summary judgment in favor of Columbia Steel and the denial of its own motion for summary judgment. Columbia Steel cross-appeals the amount of its damage award. We affirm the summary judgment in favor of Columbia Steel on PGE's antitrust liability and vacate and remand the damage award for further proceedings.

I. Facts and Procedural History

The facts are undisputed. Until 1972, PGE and PP&L competed for customers throughout Portland. This competition resulted in the duplication of transmission lines and poles, substations, and transformers throughout the city. For many years the two utilities attempted to gain regulatory approval for a division of the Portland market into exclusive service territories. In 1962, for example, PGE applied to Oregon's Public Utilities Commission (OPUC) for an allocation of an exclusive service territory in the city of Portland[2]. These efforts to secure exclusive service territories within Portland were unsuccessful, however, in part because of opposition from the city. Portland had a long-standing policy of encouraging competition among utilities, and the city charter provided that "[n]o exclusive franchises shall be granted." Portland City

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[1] Only PGE is a party to this appeal.

[2] In 1961, the Oregon legislature enacted a statute vesting in the OPUC exclusive authority to approve the creation of exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or. Rev. Stat. § 758.405. The statute authorizes the OPUC to approve contracts between competitors that divide markets into exclusive service territories. Or. Rev. Stat. §§ 758.410 - 758.425, 758.450.

Charter, § 10-206. *See, e.g.*, Portland, Or., Resolution 28879 (1962) (opposing PGE's 1962 application to the OPUC for an "allocation of exclusive areas for electric service within . . . Portland").

In 1972, PGE and PP&L jointly submitted to the city of Portland a plan to eliminate competition between them by dividing the city into exclusive service territories. This plan provided, *inter alia,* that "[s]ubject to the necessary regulatory approvals . . . it is proposed that Parcels A & B [two defined areas within the city of Portland] be served exclusively by PP&L," and that "[s]ubject to the necessary approvals, it is proposed that Parcel C [a defined area within the city of Portland] . . . be exclusively served by PGE." CR 269, exh. 47 at 2-3.

The Portland City Council disapproved the utilities' 1972 plan to displace competition with territorial monopolies in Portland. The City Council agreed, however, that the duplication of facilities should be eliminated for aesthetic, safety, and economic reasons. In the ordinance it passed, the City Council declared, "both [PGE and PP&L] operate under non-exclusive franchises and...the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (Apr. 26, 1972). The only action that the ordinance approved was "the sale, transfer and exchange of plant and property between Portland General Electric Company and Pacific Power & Light Company."[3] *Id.*

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[3] The Ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between [PGE] and [PP&L] on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The Council finds that both [PGE] and [PP&L] operate

After securing the City Council's approval of the exchange of utility properties, but not the establishment of exclusive service territories, PGE and PP&L entered into an agreement, dated July 18, 1972 (the "1972 Agreement"), which they submitted to the OPUC for approval. In contrast to the plan submitted to the Portland City Council, the 1972 Agreement said nothing about exclusive service territories in Portland. The "whereas" clauses of the 1972 Agreement recited that one of its purposes was to comply with the terms of the Portland ordinance, which had approved an exchange of plant and property, but had disapproved exclusive service territories. The 1972 Agreement recited:

> WHEREAS, [PGE] and [PP&L] wish to provide for the elimination of duplicating electric facilities in [the city of Portland]; and
>
> WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by [PGE] and [PP&L] of certain properties located within the city;
>
> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed...

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electric power systems which serve patrons within the City, that *both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies;* that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes...; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, and interchange of properties between the companies should be permitted as hereinafter set forth;...now, therefore, *the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE] and [PP&L]* as follows. ....

Portland, Or., Ordinance 134416 (Apr. 26, 1972) (emphasis added).

1972 Agreement at 1-2.

The 1972 Agreement used the following language to effect the exchange of facilities:

> 1. *Exchange of Facilities*
>
> (a) [PP&L] shall transfer and convey to [PGE] and [PGE] shall acquire from [PP&L] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PP&L] in . . . the area [in Portland] designated as Parcel C . . . .
>
> (b) [PGE] shall transfer and convey to [PP&L] and [PP&L] shall acquire from [PGE] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PGE] in the areas [in Portland] designated as Parcels A and B . . . .

1972 Agreement at 2-3.

The 1972 Agreement was approved by an order of the OPUC issued in December 1972. The 1972 Order provided, in relevant part:

> The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. . . .
>
> On July 18, 1972, [PP&L] and [PGE] entered into an agreement whereby an exchange of property and utility facilities would be made between [PGE and PP&L] in the City of Portland. . . . This exchange . . . also involves the transfer of customers from one party to the other.

. . . .

ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B. . . .

ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C] . . . .

ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be provided by that agreement between the companies herein, dated July 18, 1972.

Pub. Util. Comm'n of Or., Order 72-970 (Dec. 15, 1972) (the "1972 Order").[4]

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[4] The only reference to customer accounts in the 1972 Agreement is in Section 7, which provides in relevant part:

7. *Transfer of Customer Accounts*

The transfer of customer accounts between [PGE] and [PP&L] shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. . . .

There is no reference to customer accounts in Section 1 of the 1972 Agreement, which provides for the exchange of facilities. In referring to the transfer of customers, Section 7 does not use the "shall transfer and convey" language used in Section 1. Thus the language and structure of the 1972 Agreement, as well as the language of the 1972 Order quoted in the text, suggest that the transfer of customers was treated as a necessary incident to the exchange of facilities. For a further discussion of the transfer of customers, see *infra* pp. 17-19.

In approving the exchange of property in the city of Portland, the OPUC did not cite any of the statutory provisions that give the OPUC its authority to approve contracts between utility companies allocating exclusive service territories. *See* Or. Rev. Stat., ch. 758 ("Utility . . . Territory Allocation . . .").[5] Unlike the Portland City Council ordinance -- which had expressly disapproved exclusive service territories -- but like the 1972 Agreement, the 1972 Order said nothing about exclusive service territories in Portland. The OPUC cited as authority for its approval of the 1972 Agreement Chapter 757 of the Oregon Revised Statutes ("Utility Regulation Generally"), specifically Or. Rev. Stat. § 757.480,[6] which gives the OPUC authority to

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[5]Chapter 758 of the Oregon Revised Statutes speaks of "allocated" territories and defines that term in a way that means exclusive service territories. Section 758,400(1) defines "allocated territory" as "an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory"). Or. Rev. Stat. § 758.400(1). Section 758.410(1) permits "[a]ny person providing a utility service [to] contract with any other person providing a similar utility service for the purpose of allocating territories and customers are to be served by which of said contracting parties." Or. Rev. Stat. § 758.410(1). Section 758.425 authorizes the OPUC to approve the "contract as filed" and provides that "[I]f the commission approves [the] contract . . . the contract shall be deemed to be valid and enforceable . . . ." Or. Rev. Stat. § 758.425. Section 758.450(2) provides that "no other person shall offer, construct or extend utility service in or into an allocated territory." Or. Rev. Stat. § 758.450(2).

[6]Section 757.480 provides in pertinent part:

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $10,000, or sell, lease, assign or otherwise dispose of any franchise, permit, or right to maintain and operate such public utility or public utility property, or perform any service as a public utility;

approve the sale, lease, assignment or other disposition of public utility property.

After the OPUC issued its 1972 Order, PGE and PP&L stopped competing with each other in Portland. Each utility served customers exclusively in the parcels in which it had acquired the electric distribution facilities of the other.

Columbia Steel operates a steel casting plant located in the area which PGE began serving exclusively after the issuance of the 1972 Order. In 1987, Columbia Steel asked PP&L to service its plant because PP&L's rates were lower than PGE's. PP&L refused, citing the fact that the plant was located in the territory being served exclusively by PGE.

In 1989, Columbia Steel again asked PP&L to service its casting plant. This time, PP&L agreed and offered to enter into a supply contract with Columbia Steel. PGE objected, however, citing its 1972 Agreement with PP&L. PGE took the position that the 1972 Agreement gave it the exclusive right to service Columbia Steel's plant because it was located in the service territory allegedly "allocated" to PGE by the 1972 Agreement. Undeterred, Columbia Steel wrote PGE on May 30, 1990, asking it to "wheel" electricity generated by PP&L to the casting plant until PP&L could build a substation which would enable it to deliver power directly to the plant. PGE refused, reasserting that it had the exclusive right to service Columbia Steel's plant.

On June 19, 1990, Columbia Steel filed this antitrust action against PGE, PP&L, and the OPUC, on the theory that the division of Portland into exclusive service territories violated the

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(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

Or. Rev. Stat. § 757.480.

Sherman Act, 15 U.S.C. §§ 1-2.[7] The defendants raised the state-action doctrine as an affirmative defense, contending that the division of the Portland market was cloaked with antitrust immunity by the 1972 Order of the Oregon OPUC approving the 1972 Agreement.

In July 1990, PP&L entered into a contract with Columbia Steel and began servicing the casting plant in July 1991, when PGE began transmitting PP&L's power to the plant over PGE's power line. Columbia Steel later dismissed all its claims against PP&L, which explains why PP&L is not a party to this appeal.

On July 3, 1991, the district court rejected PGE's state-action defense in an order granting Columbia Steel's motion for partial summary judgment. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562 (D. Or. 1991). The district court held that the OPUC's 1972 Order did not articulate a state policy to allocate exclusive service territories in Portland as required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). *Pacificorp*, 770 F. Supp. At 569-71. As the district court interpreted the OPUC's 1972 Order, it approved a one-time exchange of property and customer accounts, but not an allocation of exclusive service territories. *Id.* At 570-71.

On February 4, 1993, the district court granted summary judgment for Columbia Steel on the remaining issues, ruling that PGE had violated section 1 of the Sherman Act in agreeing with PP&L not to compete in the Portland market. The court awarded Columbia Steel $508,425 in treble damages and $901,671.62 in attorneys' fees and costs.

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[7]An agreement among competitors to allocate territories is a per se violation of § 1 of the Sherman Act. *E.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (contracts that purported to restrict defendant's ability to wheel power "were 'in reality, territorial allocation schemes,' " and "were *per se* violations of the Sherman Act") (citation omitted).

II. State-Action Immunity

A. The Midcal Clear Articulation Requirement

The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy." *Midcal,* 445 U.S. at 105 (upholding state wine pricing system because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance"). The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," *id.* at 101, and limits the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992), because of Congress's "overarching and fundamental policies" protecting competition, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1987). *See also* Phillip Areeda & Donald F. Turner, *Antitrust Law* § 214e (1978).

The district court acknowledged that the provisions of chapter 758 of the Oregon Revised Statutes, which authorize the OPUC to approve contracts between public utilities allocating exclusive service territories, "articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity." *Pacificorp* 770 F. Supp. At 570. As the district court put it:

> To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, [Or. Rev. Stat.] 758.400 to 758.475,

that provider is immune from antitrust violations.

. . . .

> [Or. Rev. Stat.] 758.400(1) states that "'[a]llocated territory' means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to an receive an order from the [O]PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

Id.

Notwithstanding the clarity with which chapter 758 expresses a legislative policy of authorizing the OPUC to approve allocations of exclusive service territories, the district court rejected PGE's state-action immunity defense because the OPUC failed to exercise that authority in issuing the 1972 Order. *Id.* At 571. The district court explained that the 1972 Agreement between PGE and PP&L, which the 1972 Order approved, did not establish exclusive service territories in the city of Portland. As the district court read the 1972 Agreement, PGE and PP&L had agreed "only to an exchange of facilities within the area relevant to this action." *Id.* at 571. In other words, the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal.*

We agree with the district court that the 1972 Order fails to speak with sufficient clarity to satisfy the *Midcal* test.[8] Neither the 1972 Order nor the 1972 Agreement it approved says anything about exclusive service territories in the city of Portland. This omission becomes glaring when the language of the 1972 Order as it pertained to Portland is compared with the language of the same order as it pertained to the city of Rainier. Although the 1972 Order said nothing about the exclusive service territories in approving the exchange of property in

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[8]PGE argues that the clear articulation prong of the *Midcal* is satisfied because Or. Rev. Stat. §§ 758.400 - 758.450 "encourage exactly the kind of division that PGE and PP&L carried out," and that whether or not the OPUC clearly authorized PGE's challenged conduct is relevant only to the active supervision prong of *Midcal*, 445 U.S. at 105 (state action immunity only applies if the state actively supervises the challenged anticompetitive conduct). Resp. Of Portland General Elec. Co. To Appellant's Pet. For Reh'g and Amicus Brief of United States, at 18. In making this argument, PGE relies on *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d. 609, 612 (11th Cir. 1995) ("If [the defendant engaged in anticompetitive conduct] presumably because of a territorial agreement, but the area in question was never approved by the Commission, the [defendant's] action would not merit state action immunity because of the lack of 'active state supervision.' ") (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)), *cert. denied*, 116 S. Ct. 1678 (1996).

Praxair does not help PGE. As the Court explained in *Ticor*, the case on which *Praxair* relies, "*Midcal*'s two elements...[are both] directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. *Praxair* is nothing more than a fact specific application of the *Midcal* test. The anticompetitive conduct had been authorized by a Florida Public Service Commission order approving an allocation of service territories, and the Eleventh Circuit merely held that the order was intended to include a particular county in the exclusive service territories created. *See Praxair*, 64 F.3d at 613. Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. *Cf. Ticor*, 504 U.S. at 636-37 (first prong of *Midcal* test intended to ensure state has not acted through inadvertence).

Portland, it expressly used such language in approving a provision of the 1972 Agreement which transferred to PGE an area within the city of Rainier that had previously been served exclusively by PP&L. See 1972 Order at 8 ("ORDERED that the application of [PP&L] to transfer certain of its *exclusively served area allocated to it and lying in and around Rainier, Oregon*, to [PGE] is approved.") (emphasis added). The contrast between the "transfer and exchanging of utility property and facilities and customers" language used in the 1972 Order to describe the utilities' agreement with respect to the city of Portland, 1972 Order at 8, and the "exclusively served territory" language used in the 1972 Order to describe the utilities' agreement with respect to the Rainier area, *id.*, is striking.

Like the part of the 1972 Order relating to Rainier, the ordinance passed by the Portland City Council earlier in 1972 also referred to exclusive service territories. It did so, however, in disapproving, not approving, the elimination of competition in favor of a territorial division between PGE and PP&L. The ordinance reminded the utilities that they "operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (1972).

Our second reason for agreeing with the district court is that in approving the exchange of property in Portland, the 1972 Order does not cite any of the statutory provisions governing the allocation of exclusive service territories. Rather than citing chapter 758 or any of its provisions, the OPUC cited a provision of chapter 757, the chapter governing "Utility Regulation Generally," specifically Or. Rev. Stat. § 757.480, which authorizes the approval of exchanges of utility facilities. We are struck by the precision and care with which the OPUC cited various statutory provisions in issuing the 1972 Order. As authority for approving the transfer to PGE of the exclusively served territory in Rainier previously allocated to PP&L, the OPUC cited the statutory provision governing transfers of

previously allocated service territories (Or. Rev. Stat. § 758.460[9]). It did not cite any section of chapter 758 in approving the provisions of the 1972 Agreement relating to Portland.[10] As authority for approving the exchange of facilities in Portland, the OPUC cited only the statutory provision governing transfers of utility facilities (Or. Rev. Stat. § 757.480).

In sum, the OPUC did not "forthrightly state[ ]" a policy of the state of Oregon that was "clear in its purpose" to displace competition in the Portland market with territorial monopolies.[11] *Midcal*, 445 U.S. at 105.

The OPUC argues that, despite the failure of the 1972 Order to say anything about exclusive service territories in the city of Portland, the Order nonetheless immunized the division of the

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[9]Section 758.460 provides in relevant part:

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest. Or. Rev. Stat. § 758.460.

[10]In particular, there is no reference in the 1972 Order to Or. Rev. Stat. § 758.410, which permits utilities to contract with each other "for the purpose of allocating territories and customers between the parties." Nor is there any reference to § 758.425, which gives the OPUC its authority to approve such contracts, even though an exclusive service territory can be established only "by a contract between persons furnishing a similar utility service and approved by the commission or ... by an order of the commission approving an application for the allocation of territory." Or. Rev. Stat. § 758.400(1) (defining "allocated territory").

[11]Columbia Steel argues that PGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the city Council certainly had the *effect* of creating ambiguity in the 1972 Order.

Portland market because the "statutory import of the 1972 Order was necessarily an allocation of service territory in the City of Portland as between PGE and PP&L." Opening Brief of Pub. Util. Comm'n of Or. at 9. The OPUC asserts that the 1972 Agreement "effectively" allocated exclusive service territories because "[e]xchanging customers is logically the only way to reallocate established service territory into exclusive zones." *Id.* At 9-10. The OPUC adds that "[t]he only way that the OPUC could lawfully have approved the transfer of customers between existing utilities was under the authority of the territorial allocation statutes." *Id.* at 10. *See also* Resp. Of Portland General Elec. Co. To Appellant's Pet. For Reh'g and Amicus Brief of United States, at 7 ("The allocation statutes speak of the allocation of 'territories and *customers*.' The 1972 Agreement and the 1972 Order explicitly allocate *customers*, whether they explicitly allocate territories or not.") (citation omitted) (emphasis in original).

In response, Columbia Steel argues that nothing in the relevant statutory provisions rules out a one-time exchange of customers as an incident of an exchange of facilities without the establishment of permanent territorial monopolies. According to Columbia Steel, such a one-time exchange of customers is a practical consequence of an exchange of facilities:

> When, as in this case, a utility sells the power line that distributes electricity directly to a customer, it makes sense that the account of the customer served by that line would be transferred to the new owner of the line. Thus, the transfer of customer accounts was only an incident of the transfer of utility property. It is the practical consequence of a transfer of facilities, but it is not the perpetual grant of monopoly power. As a practical matter, unless another source of electricity is available, the customer will take service from the utility that owns the facilities connected to that customer's premises. But the utility serves that customer because it is practical to do

> so, not because the utility has an exclusive right to serve that customer.

Pet. for Reh'g, at 13-14.

Columbia Steel's argument has considerable force. It is buttressed by the fact that PP&L was able to take a good customer away from PGE simply by building a substation in PGE's "territory" to transmit power to Columbia Steel's plant at rates that were more competitive than PGE's. Thus, although the transfer of facilities, and the transfer of customers incidental thereto, gave each utility a temporary competitive advantage, it did not immunize them from competition forevermore. That PGE's advantage proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets where monopolies have traditionally reigned.

In any case, we need not resolve the dispute over whether, as the OPUC argues, an exchange of customer accounts is, as a practical matter, the factual equivalent of an allocation of exclusive service territories. Even if this were the case, it would merely be evidence that might tend to support a permissive inference that the OPUC intended to approve a displacement of competition in Portland with monopolies, and any such inference could not transform the 1972 Order into the forthright and clear statement that it takes to satisfy *Midcal's* stringent requirements.

PGE and the OPUC also argue that the OPUC's failure to cite any provision of chapter 758 as authority for the 1972 Order as it pertains to Portland renders the 1972 Order nothing more than an "imperfect regulation" which may still confer state-action immunity, citing *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law").

PGE and the OPUC's reliance on *Llewellyn* is misplaced. In *Llewellyn*, the administrator of a state agency promulgated a fee schedule for health care providers, as he was authorized to do under state statute, but bypassed statutory rulemaking procedures. We held that although the administrator had acted in a "procedurally improper manner,"the state government was nonetheless entitled to state-action immunity. *Id.* at 773. *Llewellyn* is inapposite here. There the state legislature had clearly articulated an intention to authorize the administrator to promulgate a fee schedule, and the administrator had exercised that authority in clearly articulating his intent to adopt such a feed schedule, notwithstanding that he did not follow the required rulemaking procedures of the state's Administrative Procedure Act. *Id.* At 772. In contrast, the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland; indeed, it did not speak to the issue at all. So rather than exercising its authority "imperfectly," the OPUC failed altogether to exercise its authority to approve exclusive service territories with any clarity whatsoever.

Finally, PGE and the OPUC argue that even if the 1972 Order did not clearly authorize an allocation of exclusive service territories within the city of Portland, later orders issued by the OPUC clarify the 1972 Order. In particular, the PGE and the OPUC rely upon a 1974 Order of the OPUC, which, they assert, confirmed that the 1972 Order did, in fact, confer state-action immunity.[12]

None of the OPUC orders relied on by PGE establishes state-action immunity. First, to the extent that there is language in the orders relevant to the division of the Portland market, it merely recognizes the undisputed fact that PGE and PP&L had

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[12]PGE also cites Pub. Util. Comm'n of Or., Orders 73-688 (Oct. 25, 1973), 75-704 (Aug. 13, 1975), and 79-055 (Jan. 12, 1979).

stopped competing with each other in that city.[13] For instance, the 1974 Order, on which PGE relies most heavily, states that PGE and PP&L "no longer competitively serve the same areas. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff' d sub nom. American Can Co. v. Davis*, 559 P.2d 898 (1976) (the "1974 Order"), at 25; *see also* Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975) (noting that PP&L serves customers "in parts of Portland"). That language is merely a description of the status quo; it is not an expression of a state policy to replace competition with regulation. Although the quoted language might tend to support a permissive inference that the commissioners in 1974 thought that the commissioners in 1972 had defined exclusive service territories in Portland when they issued the 1972 Order, the OPUC can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

Second, the "respective areas of service" language in the 1974 Order, as well as the language in the other OPUC orders stating that PGE and PP&L had stopped competing in Portland, cannot be construed as a product of the OPUC's exercise of its statutory authority to approve contracts allocating exclusive service territories. Because there were no such contracts before the OPUC when it issued these later orders, the orders were not issued pursuant to the provisions of Or. Rev. Stat. Ch. 758 authorizing approval of such contracts. The 1974 Order, for example, was issued pursuant to Or. Rev. Stat. §§ 757.205, 757.210, and 757.215, which pertain to changes in tariffs charged by utilities. The 1974 Order approved PP&L's revised tariff schedule, which equalized PP&L's rates in Portland with the higher rates it charged in other areas of the state. As a result, PP&L's rates for customers in Portland became higher

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[13]As Columbia Steel puts it, "[w]hether, as a matter of fact, the utilities competed is an entirely different inquiry from whether, as a matter of law, the utilities secured lawful allocations of exclusive service territory." Columbia Steel Reply Brief at 11.

than the rates charged by PGE. The "respective areas of service" language in the 1974 Order was recited merely to establish a rationale for the OPUC's action approving the new rates:

> A rate differential between Portland and [other areas] was formerly justified on the basis of competing electric service in Portland between [PP&L] and [PGE]. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.
>
> The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

1974 Order, at 25.

As a matter of law, then, neither the 1974 Order nor any of the other subsequent orders of the OPUC amend the 1972 Order to clarify that Order as an expression of state policy to displace competition with regulation. At best, these orders recite that the utilities have stopped competing with each other within territories they have defined. As our court has said, mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1981) (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976)), *cert. denied*, 459 U.S. 1145 (1983).

In sum, we agree with the district court that the elimination of competition between PGE and PP&L in Portland was not cloaked with state-action immunity. As the district court put it, the OPUC did not "specifically and clearly authorize[ ] by the relevant statutory process" a division of the Portland market into exclusively served territories. *Pacificorp*, 770 F. Supp. at 571.

B. Issue Preclusion

After Columbia Steel filed this antitrust action in federal district court, PGE applied to the OPUC for a declaration that the 1972 Order allocated exclusive service territories in Portland. In response, the 1992 OPUC issued an order declaring that the 1972 OPUC had intended to do so, and amended the 1972 Order, *nunc pro tunc,* to that effect. In its 1992 Order, the OPUC acknowledged that "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L." Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992) (the "1992 Order"), at 14.[14]

Armed with the OPUC's 1992 Order, PGE moved for reconsideration of the district court's summary judgment rulings in favor of Columbia Steel, arguing that the OPUC's 1992

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[14]The 1992 Order states, in relevant part:

> [B]cause [the 1972 Order] did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, . . . perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.
>
> For the foregoing reasons, it appears to the Commission that [the 1972 Order] is not a complete and accurate memorial of the 1972 decision of the Commissioner . . . : the order omits a reference to the statute under which its findings were actually made when the Commissioner approve the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend [the 1972 Order] nunc pro tunc, to conform to the actual decision intended and followed.

1992 Order at 14-15.

Order was entitled to full faith and credit. The district court denied the motion, reasoning that:

> [t]he availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [*v. Brown*, 317 U.S. 341 (1943)] and the authorities which have interpreted *Parker* . . . . The fact that the [O]PUC did not do what it now concludes that it intended to do in the 1972 Order does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that [the 1972 Order] neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel.

Unpublished Opinion, filed June 29, 1992, at 7-9.

We agree and hold that the 1992 Order is not entitled to preclusive effect because the issue decided by the OPUC in that order is not identical to the state-action immunity issue.[15] The issue decided by the 1992 OPUC is whether the 1972 OPUC

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[15]Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if "the issue in the two proceedings is identical." *Hickey v. Settlemier*, 864 P.2d 372, 375 (Or. 1993).

Oregon law also provides that the second tribunal may give preclusive effect to an earlier decision only if "the party sought to be precluded has had a full and fair opportunity to be heard on that issue." *Id.* Columbia Steel argues that it was not given such an opportunity before the OPUC issued the 1992 Order. Columbia Steel denies having waived its right to a hearing on the merits, pointing to record evidence that it only agreed to postpone the submission of evidence to the OPUC until the OPUC ruled on Columbia Steel's motion to dismiss for lack of jurisdiction. We need not decide whether Columbia Steel was denied a fair opportunity to be heard in the proceeding before the OPUC because, as we explain in the text, the issue in that procedure is not "identical" to the issue of state-action immunity in this federal antitrust action. *Id.*

had the intent to approve the allocation of exclusive service territories in the city of Portland. The state-action immunity issue is different. It does not turn on the fact issue of the subjective intent of the OPUC at the time it issued the 1972 Order. Rather, the state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the Portland market was "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105. As the district court said, "the availability of the defense of state-action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [and its progeny]." Unpublished Opinion, filed June 29, 1992, at 7-8. In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers.

In declaring what the 1972 OPUC intended to do, the 1992 OPUC approached the 1972 Order as though it were interpreting a contract. After finding ambiguity in the 1972 Order, the 1992 OPUC went on to decide, as an issue of fact, the intent of the 1972 OPUC by looking to extrinsic evidence such as the behavior of the parties between 1972 and 1990. *See* 1992 Order, at 12-15. To repeat, state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the "rigorous" test, *Patrick*, 486 U.S. at 100, of whether the state "clearly articulated and affirmatively expressed" its intent to displace competition with regulation as a matter of state policy. *Midcal* 445 U.S. at 105.[16]

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[16]For the same reason, there can be no issue preclusion based on the judgment of the Marion County Court affirming the 1992 Order on the ground that the it was "supported by substantial evidence." *See Columbia Steel Casting Co. V. Public Util. Comm'n of Or.*, Marion County Circuit Court No. 92C-12005, Judgment affirming Public Utility Commission of Oregon Order Nos. 92-557 & 92-1135, at 2, *aff' d without opinion*, Oregon Ct. Of Appeals (Dec. 15, 1993).

In sum, the 1992 OPUC could not satisfy the *Midcal* test retroactively by amending the 1972 Order years after PGE entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity.[17] In other words, the state of Oregon cannot satisfy the objective *Midcal* clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier.[18]

C. Foreseeability: PGE's New Argument on Appeal

PGE, joined by the OPUC, argues for the first time on appeal that state-action immunity applies because the division of the Portland market was a foreseeable result of the 1972 Order. According to PGE, "state action immunity must apply where the [challenged] conduct is the 'foreseeable result' of the state's policy." Opening Brief of Appellant Portland General Elec. Co. At 23 (citing *Nugget Hydroelectric Co. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993)). "We will review an issue that has been raised for

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[17]It is fundamental that an order or judgment is not entitled to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it. *Underwriters Nat'l Assurance Co. V. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 692, 704-05 (1982). We do not know whether the OPUC and the Marion County Court had subject matter jurisdiction as a matter of state law to amend the 1972 Order retroactively. We believe, however, that it is questionable whether either had subject matter jurisdiction to decide the federal antitrust question of state-action immunity that is now before us. We need not decide this jurisdictional question because the lack of identity between the issue decided in the 1992 Order and the issue of state-action immunity deprives the 1992 Order of any preclusive effect in this federal antitrust action.

[18]PGE's reliance on *California Aviation, Inc. V. City of Santa Monica*, 806 F.2d 905 (9th Cir. 1986), and the cases on which it relies, for the proposition that *Midcal* can be satisfied retroactively is misplaced. In *California Aviation*, the later statute "articulate[d] and affirm[ed] a *pre-existing state policy* of allowing [particular anticompetitive conduct]." *Id.* At 909 (emphasis added). In contrast, there was no pre-existing state policy to eliminate competition in the Portland market for the OPUC to articulate or affirm in its 1992 Order.

the first time on appeal under certain narrow circumstances," including "when the issue is purely one of law." *Parks Sch. Of Business v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995). Because the foreseeability issue raised by PGE and the OPUC is a pure issue of law, and because consideration of it will not prejudice Columbia Steel, *see Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994), we exercise our discretion to consider it.

In our original opinion, we agreed with PGE. We held that "[u]nder [*Nugget* and *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988)], private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct," *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 60 F.3d 1390, 1396 (9th Cir. 1995), *herewith withdrawn*. Although we said that "the 1972 Order is not particularly clear regarding the [O]PUC's intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of facilities and customer accounts," *id.* At 1396, we nonetheless "conclude[d] that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order," *id.* at 1399, "justify[ing] the inference that it was intended by the [OPUC]." *Id.* Accordingly, we held that PGE's conduct enjoyed state-action immunity from Sherman Act liability.

We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the Department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*. In doing so, we misconstrued *Medic Air* and *Nugget*. In *Medic Air*, we used *Midcal's* clear articulation test, not a foreseeability test to be substituted for the clear articulation test, in deciding that state-action immunity shielded a monopoly granted to Air Ambulance Authority in the market of dispatching air ambulances in Washoe County, Nevada. 843 F.2d at 1189. We did use a foreseeability test in *Medic Air*, but only in

deciding the reach of the antitrust immunity that protected Air Ambulance Authority's monopoly in the dispatching market. Specifically, we held that Air Ambulance Authority was not shielded from antitrust liability in using its immunized monopoly power to gain a competitive advantage in a different market, the market for air ambulance services. *Id.* We reasoned that Air Ambulance Authority's antitrust immunity in the dispatching market did not extend to the ambulance service market because anticompetitive conduct in the service market was "not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher." *Id.* (Citation omitted). As we explained, "[t]he state and its agencies have not granted Air Ambulance an exclusive [ambulance service] franchise. That they might have done so is irrelevant. The state must act if immunity is to exist . . . The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry in to the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." *Id.*

The anticompetitive conduct at issue in *Nugget* was also expressly authorized by state action independently of any foreseeability inquiry. A California statute authorized the California Public Utility Commission to "'specify the prices, terms and condition' for the sale of power by a private power producer like Nugget to a utility." 981 F.2d at 434 (quoting statute). In exercising that statutory authority, the California PUC clearly expressed an intention to regulate such sales in detail. The California PUC's implementing Guidelines provided that private power producers would "generally bear the risk of failing to develop their power facility before the five year deadline and that only rarely will permitting delays qualify as *force majeur* events." *Id.* The Guidelines specified that a utility was "'expect[ed] . . . [to] negotiate [*force majeur* claims] only in instances where it is convinced that a settlement, versus adjudication, is in the rate payers' best interest.'" *Id.* (Quoting Guidelines). We held in *Nugget* that state-action immunity extended to the anticompetitive effects of a utility's rejection of

a private power supplier's *force majeur* claim for an extension of the contract period because the anti-competitive effects were a foreseeable result of the California PUC's implementing Guidelines. *Id.*

Our rejection of PGE's argument that it is entitled to state-action immunity because the division of the Portland market was a foreseeable result of the 1972 Order is consistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), upon which we relied in *Nugget*. The issue in *Town of Hallie* was whether the city's anticompetitive activities were protected by state-action immunity "when the activities are *authorized*, but not compelled, by the State." *Id.* at 36 (emphasis added). The Supreme Court held that the challenged action of the city was protected by the state-action immunity doctrine because the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* At 42. However, the Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior. *See id.* In a contrast, the OPUC did not expressly authorize PGE to maintain exclusive service territory; it merely approved the exchange of property and customers.

In sum, neither *Medic Air* nor *Nugget* applies a foreseeability test as a substitute for the threshold *Midcal* clear articulation test. As the Antitrust Division puts it, "express authorization [is] the necessary predicate for the Supreme Court's foreseeability test." Brief of Amicus Curiae United States, at 9. PGE cites no case to the contrary and we know of none.

III. PGE's Other Defenses

In the absence of state-action immunity, an agreement between PGE and PP&L to divide the Portland market for electricity constitutes a per se violation of § 1 of the Sherman Act. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (agreement among competitors to allocate territories to diminish competition is a per se § 1 violation).

There is no genuine issue of material fact regarding the existence of such an agreement that would prevent the entry of summary judgment against PGE on liability. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996). We therefore address PGE's affirmative defenses other than state-action immunity. Although the district court found only one of these defenses worthy of discussion, we discuss each of them in turn.

A. Statute of Limitations

PGE argues that Columbia Steel's antitrust action, which was filed on June 19, 1990, is time-barred because it was filed four years after any overt act in furtherance of PGE and PP&L's agreement to divide the Portland market. *See* 15 U.S.C. § 15(b) (establishing 4-year limitations period for Sherman Act violation); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last over act"). PGE argues that the acts relied upon by the district court in finding Columbia Steel's antitrust claims timely were insufficient to restart the running of the statute because they were merely "reaffirmations" of the original 1972 Agreement to divide the Portland market. *See id.* at 238.

On May 30, 1990, Columbia Steel wrote to PGE and stated that it would terminate its contract with PGE and take power from PP&L as of July 1, 1990, if PGE would agree to wheel power for PP&L so it could serve Columbia Steel's casting plant. PGE said no, declaring in a letter dated May 30, 1990, the "[Columbia Steel] is within PGE's exclusive territory. If it desires to purchase electricity, it must do so from PGE." The district court held that PGE's refusal to wheel PP&L's electricity to Columbia Steel's casting plant was an overt act that restarted the statute of limitations.

We agree with the district court. PGE's refusal was not a mere reaffirmation of PGE and PP&L's 1972 Agreement to stop competing in the Portland market because the 1972 Agreement was not a permanent and final decision that controlled the later act. *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-01 (9th Cir.) (limitations period restarted each time tour guides shepherded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy between tour operators and other vendors) (quoting and distinguishing *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979), in which later acts were mere affirmation of earlier " 'irrevocable, immutable, permanent and final' decisions" that "completely and permanently excluded [plaintiff] from the market"), *cert. denied*, 479 U.S. 886 (1986).[19] *Hennegan* also distinguishes *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.W. 816 (1981), the only Ninth Circuit case other than *Multidistrict Air Pollution* that is cited by PGE on the statute of limitation issue, on the same ground. *Hennegan*, 787 F.2d at 1301-02.

B. Justification defenses

PGE asserts that the 1972 Order required it to stop competing with PP&L in the city of Portland, and that "had PGE failed to conform to the commands of the OPUC . . . it could have subjected itself to treble damages for violation of Oregon utility law." Opening Brief of Appellant Portland Gen. Elec. Co., at 29. PGE argues that as a result it is entitled to raise a regulatory justification defense, *see Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir.

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[19]Columbia Steel also argues that the refusal in 1987 of PGE's coconspirator PP&L to service the steel casting plant over the objection of PGE was also an overt act that restarted the statute of limitations. We need not consider the significance of the events in 1987 to the statute of limitations question because we hold that the statutory period was restarted in 1990. The 1987 events are, however, relevant to Columbia Steel's cross-appeal regarding damages, which we address in Part V, *infra*.

1981) (no antitrust liability when defendant reasonably concludes that its actions are *necessitated* by the concrete factual imperatives recognized as legitimate by the regulatory authority), *cert. Denied*, 459 U.S. 1145 (1983), and a business justification defense, *see, e.g., City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1381 (9th Cir. 1992) (utility not liable for using high-powered transmission line to the exclusion of competitors in order to keep rates low).

These justification defenses are not available to PGE. When it stopped competing with PP&L in Portland after the 1972 Order issued, it was under no compulsion to do so because the 1972 Order did not approve the allocation of exclusive service territories. Had the 1972 Order done so, a justification defense would arguably have been available to PGE because the Oregon statutes provide that only the utility that has been allocated a territory may serve that territory. *See* Or. Rev. Stat. § 758. 450(2) ("Except [under circumstances not relevant here], no other person shall offer, construct or extend utility service in or into an allocated territory."). In light of this provision, it is significant that in approving an exchange of facilities, the 1972 Order used *permissive* language. *See* 1972 Order at 8-9 ("ORDERED that [PP&L] *may* transfer to [PGE] all electric distribution plant . . . that [PGE] *may* transfer to [PP&L] all electric distribution plant . . . that the manner and method for accomplishing the transfer and exchange of property . . . and the terms and conditions governing this transfer, shall be as provided by [the 1972 Agreement]") (emphasis added). Because the language of 1972 Order was permissive, it did not require PGE and PP&L to perform the 1972 Agreement and did not prevent them from rescinding it before the property was exchanged. Given the statutory prohibition against serving a territory allocated to another utility, *see* Or. Rev. Stat. § 758,450(2), the permissive language in the 1972 Order would have been incongruous if the 1972 Order had approved an allocation of exclusive service territories.

C. The Noerr-Pennington Doctrine

PGE argues that it is entitled to antitrust immunity under the *Noerr-Pennington* doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (the Sherman Act does not prohibit competitors from "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restrain or a monopoly"); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965). The *Noerr-Pennington* doctrine, which is rooted in the First Amendment protection of political activity, *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), does not apply here. Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the *Noerr-Pennington* doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP&L to replace competition with area monopolies in the Portland market.

D. The Filed Rate Doctrine

PGE argues that the filed rate doctrine bars Columbia Steel from recovering damages even if PGE did violate the Sherman Act. The filed rate doctrine generally forbids the recovery of treble damages under the Sherman Act based on the payment of rates that are established by regulated tariffs, even if the defendants engaged in illegal price-fixing. *See, e.g., Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). According to PGE, the filed rate doctrine applies in this case as follows: (1) Because PGE could charge only the rates approved by the OPUC, it could not charge the same rate offered by PP&L to Columbia Steel; (2) PGE could not "transfer" its customer Columbia Steel to PP&L without OPUC approval; (3) thus, the district court could not award damages based on the difference between the rate charged by PGE and the "rate that

might have been approved absent the conduct at issue." Opening Brief of Appellant Portland General Electric Co. at 32.

We reject PGE's reasoning. The conduct challenged in this case is not PGE's refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the non-competition agreement that prevented Columbia Steel from buying electricity at PP&L's lower rates. The filed rate doctrine is inapplicable. To hold that it is applicable would be to "allow a blockade of a competitor to escape scrutiny. This would overextend *Keogh's* reach and could produce a rule that one who pays for services governed by [a regulatory body's] tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993).

IV. Damages

PGE argues that Columbia Steel suffered no damages at anytime because (1) at all relevant times, Columbia Steel was obligated on its requirements contract with PGE to purchase electricity from PGE, and (2) PGE could not transfer Columbia Steel as a customer to PP&L without prior OPUC approval. These arguments are to no avail. First, Columbia Steel's requirements contract with PGE did not bar it from suing PGE under the Sherman Act for agreeing with PP&L to stop competing in the Portland market. *See, e.g. Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (franchise agreement does not defeat franchisee's standing to bring antitrust suit against franchiser); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 781 (3d Cir. 1967) ("captive customer" having valid lease agreement with defendant for use of certain equipment could nonetheless sue for antitrust violation based on defendant's refusal to sell the equipment), *aff' d on other grounds,* 392 U.S. 481 (1968).

As for PGE's second argument, the only authority it cites is the 1972 Order stating that '[t]here can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customers," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

V. Columbia Steel's Cross-Appeal on Damages

Columbia Steel argued to the district court, and now argues on its cross-appeal, that it was entitled to damages beginning with PP&L's refusal in 1987 to sell Columbia Steel power at its lower rates. The district court rejected this argument, stating that "Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE." Unpublished Opinion, filed Feb. 5, 1993, at 24. The district court therefore limited recovery of damages to the period from July 1990, when Columbia Steel entered into a contract with PP&L and was thus "willing and able to actually purchase power at a lower rate from PP&L," and July 1991, when PGE began wheeling PP&L's power to Columbia Steel over PGE's transmission lines. *Id.* at 25.

We agree with Columbia Steel that the district court erred in not awarding damages beginning in 1987. The district court mistakenly held that PGE could not be liable for PP&L's refusal to sell power to Columbia Steel in 1987. PP&L was a coconspirator in 1987, and PGE is liable for the acts of PP&L in furtherance of their conspiracy not to compete in Portland. *See Beltz Travel Serv., Inc. v. International Air Transport*

Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980) ("If [plaintiff] can establish the existence of a conspiracy in violation of the antitrust laws and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of [defendants'] own actions.").

VI. Conclusion

The partial summary judgment holding PGE liable to Columbia Steel under § 1 of the Sherman Act is **AFFIRMED**. The partial summary judgment awarding Columbia Steel $508,425 in treble damages is **VACATED** and the case is remanded to the district court for a redetermination of Columbia Steel's damages in accordance with this opinion. Columbia Steel's motion for attorney's fees on appeal pursuant to 15 U.S.C. § 15 is **GRANTED**. The amount of the fees shall be determined by the district. court.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commission of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF ORDER AND AMENDED OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, presiding

Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995

Before: James R. Browning, Thomas M. Reavley*,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

ORDER

The Petition for Rehearing, filed August 3, 1995, is hereby GRANTED.

The Opinion filed July 20, 1995, and reported at 60 F.3d 1390, 1396 (9th Cir. 1995), is WITHDRAWN and the attached Opinion is ordered filed instead.

OPINION

NORRIS, Circuit Judge:

[This Opinion was identical to the subsequent Opinion (App. A), except in the following particulars:

1) Footnote 8 was expanded in the subsequent opinion. See App. A-15, n. 8;
2) The following paragraph was replaced in the subsequent opinion by the first paragraph on

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* The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

A-35.]

"As for PGE's second argument, the only authority it cites is an unexplained statement by the district court that "PGE must receive prior approval from the OPUC before it can transfer a customer to another provider of electric services." Unpublished Opinion, filed Feb. 5, 1993, at 8. Not only is the statement unexplained,[20] the district court cited no statute, regulation, or any other authority to support it. Nor does PGE offer any. In the absence of any analysis or authority for PGE's argument the OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit."

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[20] Specifically, the district court does not explain how this statement squares with its analysis leading to its rejection of PGE's state-action immunity defense.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Defendant-Appellant	No. 93-35902 D.C. No. CV-90-00592-HJF
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; Public Utility Commision of the State of Oregon, Defendants-Appellees.	No. 93-35958 D.C. No. CV-90-00524-HJF OPINION

Appeals from the United States District Court
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Argued and Submitted
May 3, 1995 - Portland, Oregon

Filed July 20, 1995

Before: James R. Browning, Thomas M. Reavley*,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

OPINION

NORRIS, Circuit Judge:

This case involves the antitrust doctrine of state action immunity. Appellee Columbia Steel (Columbia) sued appellant Portland General Electric (PGE) in district court, alleging that PGE had conspired with Pacific Power & Light (PP&L) to divide the market for electricity in Portland, Oregon. The district court granted summary judgment for Columbia, rejecting PGE's claim that a 1972 order of the Public Utility Commission of Oregon (PUC) had authorized the market division, thereby conferring federal antitrust immunity under the state action doctrine created in *Parker v. Brown*, 317 U.S. 341 (1943). PGE appeals the summary judgment in favor of Columbia and the denial of its own motion for summary judgment. We now reverse.

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*The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

I

Until the early 1970s, Portland General Electric and Pacific Power & Light competed with one another to provide electricity to the residents and businesses of Portland. This competition resulted in duplicate transmission lines and poles, substations and transformers throughout the City. In 1961, the Oregon legislature enacted a statute empowering the PUC to authorize division of markets into exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or. Rev. Stat. § 758.405. The statute provides that under certain circumstances, the PUC may approve a contract between competitors that divides a market into exclusive service territories. Or. Rev. Stat. §§ 758.410-758.450. Once the PUC has issued an order creating exclusive service territories, Or. Rev. Stat. § 758.465 prohibits any competition within those territories.

In 1972, PGE and PP&L entered into an agreement to exchange properties and customer accounts throughout the City of Portland (the Agreement). In simplified form, the Agreement divided the City and transferred properties and customers, thereby creating separate territories in which one utility or the other owned all the facilities and serviced all the customer accounts.[1] Before presenting this Agreement to the

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[1]The Agreement provided, in relevant part:

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities . . . it is agreed:

1. *Exchange of Facilities*

(a) Pacific shall transfer and convey to Portland General . . . all the electric distribution plant, including distribution substations, poles, lines, transformers, meters . . . maintained by Pacific in the area designated as Pacific's Rainier service district . . . and in the area designated as Parcel C . . .

(b) Portland General shall transfer and convey to Pacific . . . all of the electric distribution plant, including distribution substations,

PUC, the parties sought the approval of the City. The City consented to the Agreement by ordinance on April 26, 1972.[2]

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poles, lines, transformers, meters . . . maintained by Pacific in the areas designated as Parcels A and B . . . .

. . . .

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that revenue from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto . . . .

[2]The ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The council finds the both [PGE] and [PP&L] operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes . . . .; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rate for users within the City, an interchange of properties between companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE and PP&L] as follows.

Portland, Or., Ordinance 134416 (Apr. 26, 1972).

The Agreement was subsequently approved by the PUC through Order 72-870, which provides, in part:

> The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. The Commissioner's approval is also needed prior to the assignment of any allocated utility service territory pursuant to ORS 758.460.
>
> On July 18, 1972, Pacific and Portland General entered into an agreement whereby an exchange of property and utility facilities would be made . . . . This exchange and transfer also involves the transfer of customers from one party to the other.
>
> . . . .
>
> ORDERED that the application of [PP&L] to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to [PGE] is approved . . .
>
> ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B . . . .[3]
>
> ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C] . . . .
>
> . . . .

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[3]Parcels A, B, and C are all within the City of Portland. The City of Rainier service area had previously been allocated of PP&L as an exclusive service territory by the PUC.

> ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer shall be provided by that agreement between the companies herein, dated July 18, 1972 . . . .

Pub. Util. Comm'n of Or., Order 72-870 (Dec. 15, 1972) (the 1972 Order).

In the years that followed, PGE and PP&L did not compete with each other in their respective territories. During this time, Columbia Steel was served by PGE. However, in 1989, reacting to the difference in industrial rates charged by PP&L and PGE, Columbia requested PP&L to provide electrical service to its Portland plant. After considering Columbia's request, PP&L informed both PGE and Columbia that it would offer electricity to Columbia. PGE objected that PP&L was forbidden from selling power to Columbia by the 1972 Agreement and the 1972 Order, which, PGE claimed, had created exclusive service territories in Portland.

In June, 1990, Columbia filed an action in federal court against PGE, PP&L and the PUC, requesting a declaration that any purported division of Portland into exclusive service territories was beyond the scope of the 1972 Order and a violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Columbia also asked for treble damages. In its answer, PGE raised a defense of state action immunity, claiming that the 1972 Order had authorized exclusive service territories in Portland pursuant to state law.

While this action was pending in federal district court, PGE filed an application with the PUC, requesting a declaration that the 1972 Order allocated exclusive service territories in Portland. The district court denied PGE's subsequent motion to stay the federal case pending the PUC's ruling on this application, and proceeded to consider cross-motions for summary judgment on the immunity issue.

In July, 1991, the district court granted partial summary judgment to Columbia, holding that the 1972 order did not confer antitrust immunity on PGE's attempts to divide the Portland market. The court reasoned that the 1972 Order did not "clearly articulate" the intention of the PUC to divide Portland into exclusive service territories, but instead was limited to the exchange of property and facilities and a one-time transfer of customer accounts. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991).

Nine months later, in April, 1992, the PUC issued its ruling on PGE's application for a declaratory order, stating that while "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L," it was PUC's intent to approve such an allocation. Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992). The PUC therefore amended its 1972 Order, *nunc pro tunc*, to make this intention clear. In response to this ruling, PGE requested that the district court reconsider its summary judgment decision and afford full faith and credit to the PUC's decision. The district court denied the motion.

Subsequently, the court entered summary judgment on the remaining issues, holding that PGE had violated § 1 of the Sherman Act and awarding Columbia $508,425 in treble damages and $901, 671.62 in attorney's fees and costs.

II

Our discussion of the state action doctrine begins with *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), in which the Supreme Court reasoned that Congress did not intend the Sherman Act "to restrain a state or its officers from activities directed by its legislature." The Court held, therefore, that acts of a state are immune from antitrust liability. This basic premise has evolved into a multitiered analysis for determining when an anticompetitive act may be cloaked with antitrust immunity because it implements state policy. Immunity is

automatically granted to any action taken by a state legislature or by a state court in its legislative capacity. *See Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). However, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization" closer analysis is required to assure that the challenged action represents an implementation of state policy rather than private or parochial interests. *Id.* at 568. Thus, immunity is granted to acts of state agencies or municipalities only if "the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." *See Hoover*, 466 U.S. at 568-69.

The acts of private parties, such as those at issue in this case, are scrutinized even more carefully to assure that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). To that end, the actions of a private party are immunized only after passing a two-pronged test: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Federal Trade Commission v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992).

There is no question that the Oregon legislature has clearly and expressly chosen to replace competition with regulation in the utilities industry by allowing the PUC to approve agreements to divide markets into exclusive service territories. *See* Or. Rev. Stat. §§ 759.500-759.570. The issue in this case is the clarity with which the PUC must express its approval and whether that standard has been met here.

When a state legislature authorizes anticompetitive behavior contingent upon approval by a state agency, that approval must be "clearly articulated and affirmatively expressed." *Cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); Phillip

Areeda & Donald F. Turner, *Antitrust Law* ¶ 214e (1978). While the clear articulation test originally developed in a slightly different context - cases examining whether a state statute had "clearly articulated and affirmatively expressed" a policy to permit particular anticompetitive[4] - its underlying policy rationale applies with equal weight when the authorizing entity is a regulatory agency, rather than a state legislature. As in its original context, the clear articulation test here serves to "ensure that private parties [can] claim state-action immunity only when their anticompetitive acts [are] truly the product of state regulation," *Patrick*, 486 U.S. at 100. We therefore hold that when a private party claims state action immunity conferred by a state agency, the clear articulation test must be satisfied as to purported authorizations by both the state legislature and the state agency. That is to say, not only must the state make clear that it is delegating authority to the PUC to approve market decisions, but the PUC must also exercise this authority clearly and expressly. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 214e.

The next question, then, is how clearly an agency must express its approval. Columbia argues that the PUC could not have immunized the PGE-PP&L agreement not to compete in Portland without clearly expressing an intent to permit a division of the City into exclusive service areas. PGE responds that the PUC's actions meet the "clear articulation" requirement even if the 1972 Order is somewhat ambiguous. In order to reach this result, argues PGE, we should apply a "foreseeability" standard, rather than a clear statement rule, in analyzing the PUC's actions under the *Parker* test.

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[4]*See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370-73 (1991); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-44 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63-65, *Midcal*, 445 U.S. at 99-100, 102-103; *Patrick v. Burget*, 800 F.2d 1498, 1505 (9th Cir. 1986), *rev'd on other grounds*, 486 U.S. 94 (1988).

In support of its argument for a "foreseeability" standard, PGE cites a series of cases regarding actions taken by subunits of state government pursuant to statutory authorization. Although these decisions do not address conduct by private parties, the Court's analysis is applicable to the case at hand. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the court adopted the view of the plurality in *Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 415 (1978), holding that "[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie*, 471 U.S. at 42. Instead, the Court held that immunity was extended to a municipality's actions if "the legislature contemplated the kind of action complained of." *Id.* at 44 (quoting *Lafayette*, 435 U.S. AT 415). As our court later explained, when a state delegates power to a subunit of state government, it "must be assumed to have contemplated the use of restraints on competition that are a reasonable consequence or necessary corollary of anticompetitive restrictions authorized by the legislature." *Washington State Elec. Contractors Ass'n v. Forrest*, 839 F.2d 547, 553 (9th Cir.), *cert. granted & vacated on other grounds*, 488 U.S. 806 (1988). Thus, in cases challenging anticompetitive acts of municipalities, the Supreme Court has held that the clear articulation test is met if a municipality's "suppression of competition is the 'foreseeable result' of what the state authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991).

In *Nugget Hydroelecrtic v. Pacific Gas and Electric*, 981 F2.d 429 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993) and *Medic Air Corp. v. Air Ambulance Auth.*, 843 F2.d 1187 (9th Cir. 1988), this court extended the "foreseeability" standard to cases in which a private party claimed state agency authorization of its anticompetitive acts. We therefore follow *Nugget Electric* and *Medic Air* and apply the "foreseeability" standard here.

In *Nugget Hydroelectric v. Pacific Gas and Electric*, 981

F2.d at 433-435, we considered whether regulations promulgated by a state public utility commission were sufficiently clear to confer state action immunity on a privately owned utility. We stated that the utility would be entitled to state action immunity if the conduct was "clearly articulated and affirmatively expressed state policy. This may be satisfied if the conduct is a 'foreseeable result' of the state's policy." *Id.* at 434. We then scrutinized the relevant PUC regulation and determined that the defendant's action was " a foreseeable result of state policy, and therefore satisfies the clear articulation requirement of the state action doctrine." *Id.*

In *Medic Air Corp.*, 843 F2.d at 1189, a county agency designated an air ambulance company as the exclusive air ambulance dispatcher in Washoe County, Nevada. We held that this authorization did not immunize the company from complaints that it was using its position as exclusive dispatcher to direct ambulance business to itself and to exclude its competitors. In so doing, we applied the foreseeability standard, starting "[t]he alleged anticompetitive conduct was not a 'necessary or reasonable consequence' of the [agency's] decision to establish an exclusive dispatcher." *Id.* (quoting *Springs Ambulance Svc., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984)).

Under existing Ninth Circuit caselaw then, private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct. We now turn to the question whether PGE's conduct in agreeing with PP&L to divide Portland into exclusive service territories was a foreseeable result of the PUC's 1972 Order.

III

We agree with the district court that "[t]he difficult issue in this case is whether the 1972 Agreement effected a territorial division of customers as contemplated by the Oregon

legislature." 770 F. Supp. at 570. Unfortunately, the 1972 order is not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market, as opposed to one-time exchange of facilities and customer accounts. For this reason, the district court held that the Order failed to meet the strict "clear articulation" test. However, we believe that under our current, more liberal "foreseeability" standard, the 1972 Order is sufficiently clear to cloak the PGE-PP&L agreement with state action immunity.

Columbia argues that PGE's anticompetitive conduct was not a foreseeable result of the 1972 Order because the Order limits PUC approval to an exchange of properties and a one-time transfer of customer accounts. Columbia points out that the Order never uses the term "exclusive territory" to refer to the arrangement being approved, even though it does use that term to describe the area around the City of Rainier, which had previously been declared the exclusive territory of PP&L. Furthermore, in setting the legal framework for the PUC ruling on the application, the Order does not mention the statutory provisions that authorize the PUC to approve agreements creating exclusive service territories (Or. Rev. Stat. §§ 758.410 - 758.440), even though it does refer to the statutory provisions requiring PUC approval for the sale of utility company property (Or. Rev. Stat. § 757.480) and for the transfer of a previously allocated exclusive territory (*Id.* at § 758.460).

We agree that these omissions tend to create the impression that the PUC did not intend to approve the creation of new exclusive service areas for PGE and PP&L in the City of Portland. But such a reading of the 1972 Order would leave ambiguous the purpose behind the PUC's clear authorization of a transfer of facilities and customer accounts between PGE and PP&L. Columbia argues that by approving the transfer, the PUC may have intended to authorize the creation of de facto exclusive territories, but only on a temporary basis. PGE, however, points to other aspects of the Order to support its position that the PUC intended to approve a long-term division

of Portland into two exclusive service areas.[5] Most powerfully, PGE argues that there would be little point in creating single-provider territories if customers could later choose to return to their original provider. The initial division was desirable largely because it eliminated the need for duplicate poles, lines and other facilities in each territory. This benefit would be lost if each utility were at liberty to serve customers in each other's areas by again duplicating poles and lines.

Columbia responds first by suggesting that the PUC intended to permit customers to switch utilities by requiring the primary utility in their area to transport its competitor's electricity to them through a process called "wheeling." With the wheeling process in use, only one set of power lines and facilities would be required for each territory, but each customer would still have a choice of providers. Columbia has not shown, however, any indication of an intention on the part of the PUC to permit or require wheeling arrangements; indeed, we find some indication that the PUC intended the contrary. The original version of the 1972 Agreement provided that employees of each utility would be continued to be served by their employers regardless of the territory in which they lived, apparently in order to permit the utility workers to continue receiving employee discounts on electricity. In the final version of the 1972 Order, however, utility employees were required to purchase from the utility serving the area in which they lived. The 1972 Order provides:

> This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the

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[5]PGE also argues that the district court erroneously failed to give full faith and credit to the PUC's 1992 decision interpreting and amending the 1972 Order to make it clear that it intended to create exclusive service territories in 1972. Because we reverse on the basis of our reading of the 1972 Order, we do not reach the full faith and credit question.

> right to choose which utility he will take.
> . . . [T]hese employees, like any other customers in the area, must become the customers of the new utility serving the area.

Order 72-870 at 7. Thus the PUC did not permit wheeling even for the narrow purpose of allowing utility employee-customers to be served by their respective employers. This amendment to the original order is, of course, inconsistent with Columbia's position that the transactions between PGE and PP&L, which necessarily resulted in separate service areas, were approved by the PUC as temporary, de facto measures that could be circumvented by "wheeling."

Columbia next argues that the PUC intended at least to permit customers to change providers when doing so would not require duplication of facilities. Again, the facts of this case are to the contrary. Although PP&L continued to own a transmission wire running across Columbia's property which would have enabled PP&L to serve Columbia without duplicating PGE's facilities, there is nothing in the Order to suggest that the PUC intended to permit PP&L to serve a customer in PGE's territory in this way. Although such an exception might have been consistent with the PUC's overall goals, there is no indication that the 1972 Order permitted it.

PGE argues that Columbia's position is undercut by six orders issued by the PUC between 1972 and 1989. According to PGE, these orders render its understanding of the 1972 Order more reasonable, and its 1989 decision to oppose PP&L's service to Columbia more foreseeable. Order 74-658 addresses the issue at hand most directly.[6] In it, the PUC denied PP&L's

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[6]The other orders cited by PGE are less clear, but are also consistent with PUC approval of exclusive service territories. In 1975, the PUC noted that PP&L served customers "in parts of Portland." Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975). Orders issued in 1973 and 1979 described PGE's "service area" as situated "within a state-approved service

request for a tariff that would equalize the two utilities' rates in Portland, reasoning the "[t]he two companies no longer competitively serve the same area. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff'd sub nom American Can Co. v. Davis*, 559 P.2d 898 (1976). This official statement, issued before the acts that gave rise to this lawsuit,[7] is an authoritative clarification of the PUC intention.[8]

Columbia responds that Order 74-658 did nothing more than observe that the utilities were not, in fact, competing, and so did not address whether they were legally entitled to refrain from competition. But this interpretation fails to account for the PUC's statement that the utilities' "respective areas of service within Portland have been defined." Surely if the PUC observed that the utilities had carved out exclusive territories without PUC approval, it would have taken action to prevent violation of its 1972 Order. The most reasonable interpretation of this statement is that the PUC believed in 1974 that the 1972 Order had created exclusive service territories which the utilities

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area allocation." Pub. Util. Comm'n of Or., Order 73-688 (Oct. 25, 1973); Pub. Util. Comm'n of Or., Order 79-055 (Jan. 25, 1979).

[7]Of course, PGE cannot base its foreseeability argument on the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case, since it could not have relied upon those statements when it decided to oppose the transfer of Columbia to PP&L. The question is whether the anticompetitive actions were authorized when undertaken, which turns on whether they were a foreseeable consequence of the actions the PUC had taken up to that point. Thus, neither the PUC's retroactive amendment of its 1972 Order in 1992, nor its litigation positions in this case, can create PGE immunity for actions taken in 1989-90.

[8]Both PGE and Columbia also present a variety of extrinsic evidence, including deposition testimony of former PUC Commissioners, to demonstrate the Public Utility Commissioner's subjective understandings of what they intended to approve in 1972. The district court properly refused to consider such evidence. Immunity is conferred by the official actions of state government, not by the subjective intentions of state officials.

were respecting.

Columbia's strongest argument is that the Agreement and the 1972 Order were intentionally made ambiguous in order to slip the Agreement past the City of Portland, which had successfully opposed a past attempt by PGE to be allocated exclusive service territories in the City. Before presenting their Agreement to the PUC, the utilities sought approval from the City.[9] Columbia presents evidence to show that the City was adamantly opposed to any agreements that would result in the division of Portland into exclusive service territories.[10] PGE

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[9]There is a dispute over whether City approval was actually necessary in order to proceed with the proposal before the PUC. Columbia points to the franchise agreement between PP&L and the City, which authorizes PP&L to use the public streets for transportation of electricity. The ordinance granting this franchise includes a provision requiring City approval of any anticompetitive combinations between PP&L and any other provider. PGE and the PUC argue that the City does not have the power to use its franchising authority to veto exclusive service territories created by the PUC pursuant to Or. Rev. Stat. §§ 758.410 *et seq.* For our purposes, it makes little difference whether the utilities were required to receive City approval, or simply chose to solicit approval to avoid City opposition to the proposal before the PUC. In granting state action immunity, we do not inquire whether "the state's attempted exercise of its power is imperfect in execution under its own law. . . . Ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." *Llewellyn v. Crothers,* 765 F2.d 769, 774 (9th Cir. 1985) (internal quotation marks omitted); *see also City of Columbia*, 499 U.S. at 371-372. Thus, even if the PUC lacked authority under state law to approve an agreement to create exclusive service territories in derogation of the City's franchising power, this is one of the "[o]rdinary errors or abuses in the administration of powers" that do not defeat a claim for state action immunity.

[10]In 1962, PGE filed an application with the PUC for creation of exclusive service territories for PGE in the areas it served throughout the state, including Portland. The City passed a resolution opposing the application, claiming that it interfered with the City's right to regulate service in the City by controlling franchises. Portland, Or., Resolution 28879 (Aug. 22, 1962). PGE then amended its application to exclude an allocation in Portland, after which the City withdrew its opposition and the PUC approved the application.

admits that while prior drafts of the Agreement included specific language making clear that the parties intended to create such territories, that language was removed before the contract was presented to the City. This had the natural result of making the contract more ambiguous and thereby less politically vulnerable.

Columbia suggests that these facts establish either 1) that in response to the known opposition of the City to monopolistic agreements, the utilities did not ask for and did not receive permission from the PUC to create exclusive service territories; or 2) that the utilities succeeded in slipping a monopolistic agreement past the City, a ploy that should not be awarded with antitrust immunity. Both arguments have some force, but we ultimately find them unconvincing.

Even assuming that Columbia has described this context accurately, we still must conclude that the 1972 Order had the foreseeable effect of leading PGE and PP&L to stop competing in the territories created by the Order. If the PUC had in fact intended to bow to potential pressure from the City and to decline to authorize permanent exclusive territories, we cannot see why it would have chosen, nonetheless, to permit a one-time transfer of thousands of customer accounts to create merely temporary exclusive territories. We must conclude that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order, especially as clarified by Order 74-658.

Second, while Columbia's allegations about PGE's maneuvering are forceful, we conclude that they cannot effect the outcome of the state immunity analysis in this case. The

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In its 1972 ordinance, the City also stated that "both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Ordinance 134416. Columbia argues that this shows the City's continuing opposition to exclusive service territories and its understanding that the 1972 Agreement did not provide for them.

question of immunity ultimately turns on whether the State, acting through the PUC, approved the division of the market. We do not inquire into the wisdom of the State's decision. Nor do we inquire whether the parties were conspiring to hoodwink the City of Portland or otherwise acting in bad faith. See Columbia, 499 U.S. at 376-78. "The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of objective standards set forth in *Parker* and the authorities which interpret it." *Llewellyn v. Crothers*, 765 F2.d at 774. These authorities make clear that regardless of the tactics used to secure state authorization, "*any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'" *Columbia*, 499 U.S. at 377-78 (Quoting *Hoover*, 365 U.S. at 568).

CONCLUSION

Under our current caselaw, the "clear articulation" requirement, even when applied to private conduct, requires only that the anticompetitive conduct be sufficiently foreseeable to justify the inference that it was intended by the authorizing agency.[11] We therefore conclude that the district court erred in granting Columbia summary judgment and in denying summary judgment to PGE.

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[11]In a footnote in its brief, Columbia asserts -- but does not argue -- that PGE fails the "active supervision" prong of the state action immunity test and cites its brief before the district court. Appellee's Opening Brief at 17 n.16. PGE argues that this does not suffice to raise the issue. Appellant's Reply Brief at 6. We decline to order a remand to consider an issue raised in such a manner and having so little merit. The PUC had and exercised the authority to approve or disapprove the market division, was actively involved in overseeing the details of the division of the Portland market, and continues to exercise extensive control over the behavior of the utility companies pursuant to statute. *See* Or. Rev. Stat. §§ 756.040, 756.070 - 756.200, 758.400 - 758.470; *Patrick v. Burget*, 486 U.S. at 101-02; Pub. Util. Comm'n of Or., Order 72-870 (Dec. 15., 1972).

We REVERSE the summary judgment in favor of Columbia Steel and REMAND to the district court for entry of judgment in favor of Pacific [sic] General Electric.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFICORP, doing business as Pacific Power & Light Company, an Oregon corporation Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; COLUMBIA STEEL CASTING CO., INC., an Oregon corporation; and PUBLIC UTILITY COMMISSION OF OREGON, Defendants.	(CONSOLIDATED CASES) Civil No. 90-524-FR (LEAD)
	O P I N I O N
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation;	Civil No. 90-592-FR

PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, NANCY RYLES, and RONALD EACHUS,

Defendants.

FRYE, Judge:

The matters before the court are:

1) the motion to stay (#20) of Portland General Electric Company (PGE);

2) the motion to stay (#30) of the Public Utility Commission of the State of Oregon (PUC);

[omitted]

BACKGROUND

In 1972, PGE and Pacificorp, doing business as Pacific Power & Light Company (PP&L), entered into an agreement (the 1972 Agreement)[1] to exchange electric distribution properties and customer accounts in defined areas within and around the City of Portland in order to eliminate duplicate electric utility facilities. In general, PP&L transferred its properties and customers within the Rainier Service District, an area which the agreement labels as "Parcel C," to PGE in exchange for PGE's transfer to PPL of its properties and customers in areas labeled Parcels A and B in the 1972 Agreement.

[1] In the complaint, PP&L uses the label "Facilities Agreement" to refer to the 1972 Agreement between PGE and PP&L. However, PGE objects to this label. Therefore, the court has chosen to refer to the agreement as the "1972 Agreement."

The City of Portland consented to the agreed exchange.[2] The Public Utilities Commissioner approved the agreement. By Order 72-870, the PUC approved "the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approv[ed] the transfer and exchang[e] of utility property and facilities and customers between the two companies as applied for." Exhibit 1 to PGE's Motion to Stay, p. 39.

Columbia is within the area identified by the 1972 Agreement as Parcel C. Parcel C is the area from which PP&L transferred its property and customers to PGE. At the time the agreement was signed, Columbia was not a customer of PP&L. Columbia has always been a customer of PGE. Columbia purchases electricity from PGE pursuant to an Agreement for Electric Power Service (PGE Agreement) which is automatically renewed on a yearly basis until one party provides written termination notice to the other party at least thirty days prior to the anniversary date of the start of the first term of the agreement, July 1, 1980.

At present, the electric rates for PP&L's industrial customers, such as Columbia, are less than the electric rates for PGE's industrial customers. Columbia has requested PP&L to provide it with electricity. PP&L owns a transmission line that crosses the plant site of Columbia.

In a letter from Columbia to PGE[3], dated May 30, 1990, Columbia notified PGE that because PGE had announced that it might seek, through litigation, to prevent PP&L from providing electricity to Columbia, PP&L had not constructed a necessary substation to supply Columbia with alternate electric service. In the letter, Columbia requested PGE to deliver electricity provided by PP&L to Columbia as of 12:00:01 a.m.

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[2] Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972.

[3] Exhibit A to Answer and Counterclaims of Columbia, p. 35.

July 1, 1990, and until the resolution of litigation. In a letter from PGE to Columbia[4], dated May 30, 1990, PGE stated that Columbia was within the exclusive service territory of PGE and therefore must purchase electricity from PGE.

On May 31, 1990, PP&L filed this action, Civil No. 90-524-FR, seeking a declaratory judgment against PGE, Columbia and the PUC. PP&L prays for a judgment declaring the rights and obligations of the parties under the PGE Agreement, the 1972 Agreement, and the Sherman Antitrust Act.

On June 19, 1990, Columbia filed a related action, Civil No. 90-592-FR, now consolidated with Civil No. 90-524-FR (this action), for a declaratory judgment, injunctive relief and damages against PGE, PP&L, and PUC Commissioners Myron B. Katz, Nancy Ryles (now deceased), and Ronald Eachus. Columbia seeks a judicial declaration of the rights and obligations of the parties as follows:

a. that Columbia may terminate the PGE Agreement and take service from Pacific;

b. that PGE does not have an exclusive right to serve Columbia under the terms of the Facilities Agreement;

c. that the Portland City Charter, state utility law and Portland franchise agreements permit Pacific to serve Columbia;

d. that the PUC's Order 72-870 does not empower or authorize PGE to monopolize electric power service to Columbia Steel, nor does it serve to foreclose Pacific from providing electric service to Columbia Steel;

e. that the Portland City Charter prohibits the formation of exclusive service territories within the City of Portland;

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[4] Exhibit A to Answer and Counterclaims of Columbia, p. 37.

f. that the wrongful conduct by defendants PGE and PUC alleged herein, to prevent service to Columbia Steel from alternative electric power suppliers violates state utility laws and Federal and state antitrust laws; and,

g. that Pacific is obligated by applicable Federal antitrust law, state antitrust law and state utility statutes to serve Columbia Steel upon request.

Columbia Complaint, para. 39.

On July 2, 1990, PGE filed an application with the PUC for orders concerning territorial allocations within the City of Portland. PGE's application requests cumulatively, and not in the alternative, as follows:

1. pursuant to O.R.S. 756.450 and O.A.R. 137-02-010 to 060, a declaratory order of the PUC affirming that the order[5] allocated exclusive service territory in the City of Portland;

2. pursuant to O.R.S. 758.420 and O.A.R. 860-25-010, an order of the PUC approving an agreement between PGE and PP&L allocating to PGE certain service territory in the City of Portland; and

3. pursuant to O.R.S. 758.435 and O.A.R. 860-250-010, an order of the PUC allocating to PGE certain territory in the City of Portland now served exclusively by PGE.

On July 3, 1990, PGE filed a motion to stay this proceeding until after the resolution of its application before the PUC. On July 30, 1990, the PUC filed both its answer to the

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[5] PUC Order 72-870 approving the 1972 Agreement.

combined complaints and a motion to stay these proceedings until the related action before it is complete.

In answer to the combined complaint, the PUC denied, due to insufficient knowledge, nearly all of the allegations. However, it did admit that the 1972 Agreement created allocated service territories within the City of Portland and did admit that PP&L is barred from providing electric service to Columbia. PUC Answer, para. 13.

On August 1, 1990, PGE filed its answers to the complaints. PGE alleges that PUC Order 72-870 approving the 1972 Agreement legally created exclusive service territories and that under the state action doctrine, the agreement and the utilities are immune from federal antitrust laws. Alternatively, PGE alleges that the PUC has interpreted its 1972 order as establishing exclusively served territories and that PGE acted in good faith in complying with the order as interpreted by the PUC.

CONTENTIONS OF THE PARTIES

PGE argues that the issues in its related application before the PUC are dispositive of the claims in this case. PGE argues that "[t]he PUC does have the power to immunize the alleged violations of the antitrust laws under the state action doctrine." PGE Reply in Support of Motion to Stay, p. 15 (emphasis in original). PGE contends that the state action doctrine applies if the PUC has clearly articulated and affirmatively expressed state policy and is actively supervising territorial allocation. PGE contends that the PUC should be permitted to resolve any ambiguities regarding the meaning of its order as material aid to this court in ultimately deciding the case.

PGE contends that both its application with the PUC and this case seek a declaration of prospective rights and obligations as they relate to the provision of electric service by PP&L to Columbia. PGE characterizes the allocation of territories as a

technical and a policy decision. PGE argues that the doctrine of primary jurisdiction justifies preliminary action by the PUC. In summary, PGE argues that this court should stay this case until after the PUC has responded to its request for prospective allocation.

The PUC also asserts that the doctrine of primary jurisdiction requires a stay of this case. The PUC acknowledges that an issue raised by Columbia is whether the PUC has authority to allocate territory in cities which franchise two or more utilities. The PUC asserts that because it "has been interpreting territorial allocation statutes for years," it should "have first call." PUC Motion to Stay, p. 8. The PUC contends that "[i]f nothing else, what the PUC decides on PGE's request for <u>prospective</u> allocation of territory is something for which this court should wait." PUC Motion to Stay, p. 9 (emphasis in original).

Columbia responds that the motions to stay should be denied because the doctrine of primary jurisdiction does not apply. Columbia argues that the interpretation of the meaning of the 1972 order is not a technical, but rather a legal, question. Columbia also contends that the administrative proceeding will not address the antitrust aspects of this case. Columbia asserts that "PGE's asserted defense to the anti-trust laws requires a determination by the Court of the legal effect of a contract between PGE and PP&L and the 1972 Order." Columbia's Memo in Opposition, p. 3.

Columbia argues that a central question in this case is whether the law allows territorial allocations within the City of Portland, not whether the territory in question is appropriate for exclusive service. Columbia further asserts that as a party to the case, the PUC can determine and then assert its view of the meaning and effect of the 1972 order.

Columbia also argues that a determination of these issues by the court would assist and instruct rather than interfere with the administrative agency carrying out its lawful mandate.

ANALYSIS

The decision whether to proceed is within the discretion of the court. The doctrine of primary jurisdiction applies where the resolution of a claim before a court requires the resolution of issues by the court, which under a regulatory scheme have been placed within the special competence of an administrative body. In such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956). The doctrine of primary jurisdiction calls for the referral of a case to an administrative body for preliminary review when issues not within the conventional experience of judges are raised or when the case requires the exercise of administrative discretion. The doctrine of primary jurisdiction promotes the uniform and expert administration of the regulatory scheme.

The PUC is a party to this proceeding and has asserted in its answer that the 1972 Agreement "created allocated service territories within Portland and that Pacific is barred from providing electric service to Columbia." PUC Answer, para. 13. "Allocated territories" can only be created by approval of the PUC. See O.R.S. 758.400(1). Implicitly, the PUC has charged that it has the authority, and has exercised that authority, to create allocated territories within the City of Portland. The PUC has already addressed the issue before this court and will have an opportunity to address it again in this proceeding. Whether PUC Order 72-870 legally created allocated territories within the City of Portland is an issue riper for judicial determination. The doctrine of primary jurisdiction does not justify a stay of this case.

The motions to stay, PGE #20 and PUC #30, are denied.

CONCLUSION

1. PGE's motion to stay (#20) is denied.

2. PUC's motion to stay (#30) is denied.

[omitted]

DATED this 27th day of September, 1990.

/s/_____
HELEN J. FRYE
United States District Judge

APPENDIX E

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFICORP, doing business as Pacific Power & Light Company, an Oregon corporation Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; COLUMBIA STEEL CASTING CO., INC., an Oregon corporation; and PUBLIC UTILITY COMMISSION OF OREGON, Defendants.	(CONSOLIDATED CASES) Civil No. 90-524-FR (LEAD)
OPINION	
COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation;	Civil No. 90-592-FR

PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, NANCY RYLES, and RONALD EACHUS,

Defendants.

FRYE, Judge:

The following matters are before the court:

1) the motion for partial summary judgment of Columbia Steel Casting Co., Inc. (Columbia) (#72); and

2) the cross-motion for summary judgment of Portland General Electric Company (PGE) (#82).

UNDISPUTED FACTS

On July 18, 1972, PGE and Pacific Power & Light Company (Pacific) entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement). The 1972 Agreement provides, in part:

> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:
>
> 1. Exchange of Facilities
>
> (a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A

and described in Exhibit C, and in the area designated as Parcel C, shown on exhibit A and described in Exhibit B; excluding, however: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.

(b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities described under the streetlight plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

. . . .

7. Transfer of Customer Accounts

> The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

Exhibit K to Affidavit of L. Guy Marshall (Marshall Affidavit), pp. 2-3, 9.

The City of Portland had consented to the agreed exchange in Ordinance 134416 enacted on April 26, 1972, which states, in part:

> An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.
>
> The City of Portland ordains:
>
> Section 1. The Council finds that both Portland General Electric Company and Pacific Power & Light Company operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation

> to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes which results in some areas in doubling the number of such poles and wires and appurtenances causing interference with view and some accidental breakage of such wires or poles, and additional investment which increases the rate bases upon which said companies are entitled to earn a profit; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an interchange of properties between the companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between Portland General Electric and Pacific Power & Light Company as follows.

Exhibit J to Marshall Affidavit, p. 1

By Order #72-870 entered on December 15, 1972, the Public Utilities Commission (the PUC) concluded that:

> [T]he application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore
>
> ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively

served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further

ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the boundaries of Parcel A as described in Appendix "A," and within the boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core . . . .

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that agreement between the companies therein, dated July 18, 1972.

Exhibit O to Marshall Affidavit, pp. 8-9.

At the time the 1972 Agreement was signed, Columbia was a customer of PGE and continues to purchase electricity from PGE pursuant to an Agreement for Electric Power Service (PGE Agreement), which is automatically renewed on a yearly basis unless and until one party provides timely written notice of termination to the other party.

The electric rates for the industrial customers of Pacific are less than the electric rates for the industrial customers of PGE. Pacific owns a transmission line that crosses the plant site of Columbia.

Columbia and Pacific entered into negotiations in 1990 aimed at having Pacific, rather than PGE, furnish electricity to the plant site of Columbia. In April, 1990, Pacific notified Columbia that it would offer Columbia an electric power contract. PGE thereafter notified Columbia that, Pacific could not lawfully furnish electricity to Columbia because, in PGE's opinion, service by Pacific to Columbia would constitute a breach of the 1972 Agreement.

On May 30, 1990, Columbia advised PGE that because PGE had announced that it might seek, through litigation, to prevent Pacific from providing electricity to Columbia, Pacific had not constructed a substation necessary to supply Columbia with alternate electrical service. In the letter, Columbia

requested PGE to deliver electricity to Columbia as of 12:00:01 a.m. July 1, 1990 and until the resolution of this litigation. In a letter to Columbia dated May 30, 1990, PGE stated its position, which was that Columbia was within the exclusive service territory of PGE, and therefore must purchase electricity from PGE.

On May 30, 1990, Pacific filed an action, Civil No. 90-524-FR, against PGE, Columbia and PUC for a judicial declaration of the rights and obligations of the parties under the PGE Agreement, the 1972 Agreement, and the Sherman Antitrust Act.

On June 19, 1990, Columbia filed a related action against PGE, Pacific and PUC (Civil No. 90-592-FR), which was thereafter consolidated with Civil No. 90-524-FR, seeking a judicial declaration that Columbia may terminate the PGE Agreement and take service from Pacific; that PGE does not have an exclusive right to serve Columbia under the terms of the 1972 Agreement; that the Portland City Charter, the state utility laws, and the Portland franchise agreements permit Pacific to serve Columbia; and that Order #72-870 of the PUC neither empowers or authorizes PGE to monopolize electric service to Columbia, nor serves to foreclose Pacific from providing electrical service to Columbia.

In an Opinion and Order filed October 11, 1990, this court stayed all discovery upon the motions of Pacific and Columbia except as necessary "to resolve the issues relating to the claim of [PGE] that it has the exclusive right to provide electric services to [Columbia] and whether there is a legal defense to the regular and ordinary application of the antitrust laws." Opinion and Order, p. 4.

Pacific subsequently moved for voluntary dismissal of the initial action, Civil No. 90-524-FR, pursuant to Fed. R. Civ. P. 41(a)(2) on the grounds that Pacific and PGE resolved the issues in that action by executing a settlement agreement. The motion was granted, and the initial action has been dismissed.

Columbia now moves the court for an order granting a partial summary judgment in its favor and for a declaration as follows: 1) that PGE does not have an exclusive right to

furnish electricity to Columbia; 2) that Columbia has a right to seek electric power service from Pacific; and 3) that Order #72-870 of the PUC neither empowers or authorizes PGE to monopolize the service of electric power to Columbia, nor does it serve to foreclose Pacific from providing electric power to Columbia.

CONTENTIONS OF COLUMBIA

Columbia contends that the 1972 Agreement doest not provide for the allocation of exclusive service territories within and around the City of Portland, and that the order of the PUC does not approve the allocation of exclusive service territories. Columbia further contends that the allocation of exclusive territories is unlawful in the City of Portland because the City of Portland has prohibited territorial allocations in its City Charter. Columbia argues that O.R.S. 758.470(1) bars the PUC from granting applications for territorial allocations in the City of Portland because it states that "ORS . . . 758.400 to 758.475 shall not be construed or applied to restrict the powers granted to cities to issue franchises."

Columbia further contends that the language of the 1972 Agreement provides only for the transfer of equipment, facilities, certain property, and customer accounts, but does not provide for the allocation in perpetuity of exclusive service territories. Columbia points out that the language of the 1972 Agreement does not contain the terms "territorial allocation," "exclusive service territory," or any other terms which can be interpreted to constitute an intent of the parties to provide for territorial allocations under O.R.S. 758.410 (1).

Columbia relies upon the language of the 1972 Agreement, the prior city ordinance, and the subsequent order of the PUC, which consistently refer to the 1972 Agreement as an "exchange" of properties or a "transfer" of facilities and customer accounts. Columbia argues that the use of these terms is significant in that the transfer of facilities was subject to the approval of the PUC under O.R.S. 757.480 et seq., while the creation of exclusive service territories is subject to approval of

the PUC under O.R.S. 758.425(1).

Columbia points out that in their application to the PUC in 1972, PGE and Pacific sought approval only to exchange electric utility properties, service facilities, and customers under Chapter 757 of the Oregon Revised Statutes and did not seek approval of exclusive service territories under Chapter 758 of the Oregon Revised Statutes. Columbia argues that the absence of any reference in the order of the PUC to the statutes governing the creation of new territorial allocations as provided in O.R.S. 758.410(1) was not an oversight by the PUC.

Columbia asserts that the failure of PGE and Pacific to make any reference to chapter 758 in their application to the PUC forecloses the Commissioner of the PUC from making any territorial allocation under Chapter 758 because the necessary procedural rules of the PUC which were in effect in 1972 provided that any application must "state clearly and concisely the authorization or permission sought, [and] shall cite by appropriate reference the statutory provision or other authority under which the Commissioner's action is sought." Exhibit Q to Marshall Affidavit, p. 1 (Former OAR 860-13-025).

Columbia points out that PGE and the PUC had explicitly provided for the allocation of territories in agreements reached prior to the 1972 Agreement by using terms such as "allocation of service territories and customers between them." See, e.g., Agreement between City of Cascade Locks and PGE (Exhibit T to Marshall Affidavit); Agreement between Consumers Power, Inc. and PGE (Exhibit CC to Declaration of Eric R. Todderud (Todderud Declaration)); Agreement between West Oregon Electric Coop, Inc. and PGE (Exhibit DD to Todderud Declaration); and Agreement between Tillamook County People's Utility District and PGE (Exhibit EE to Todderud Declaration). The Agreement between West Oregon Electric Coop, Inc. and PGE signed on February 26, 1962, for example, states, in part:

> Whereas, the Coop and the Company each desire to prevent duplication of electric utility facilities within the territory hereinafter described by the allocation of

> service territories and customers between them, and by limiting the right of each to extend electric power distribution lines within the boundaries hereinafter established.

Exhibit DD to Todderud Declaration, p.1. Columbia contrasts the language in the 1972 Agreement which states: "WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric facilities in the foregoing areas." Exhibit K to Marshall Affidavit, p.1.

Columbia contends that the doctrine of state action does not permit this court to insert into the 1972 Agreement and the order of the PUC essential, but missing, terms. Columbia argues that the order of the PUC which provides for the limited exchange of facilities and customers is not a grant of a perpetual and exclusive monopoly because the application submitted by PGE and Pacific did not ask for the authority to monopolize the supply of power in an area which had previously been subject to competition.

In the event that the court concludes that an exclusive territorial allocation exists, Columbia contends that this territorial allocation is invalid because it violates the Sherman Antitrust Act. Columbia argues that the doctrine of state action does not immunize PGE from federal antitrust liability because the State of Oregon has not clearly articulated a policy to displace competition for electric service customers in the City of Portland, and the laws of the State of Oregon do not provide for the active supervision of the displacement of competition under territorial allocation statutes.

CONTENTIONS OF PGE

PGE has filed a cross-motion for summary judgment in its favor seeking an order of the court declaring 1) that the 1972 Agreement between Pacific and PGE, as approved by PUC Order #72-870, lawfully allocates service territory in the City of Portland; 2) that PGE has an exclusive right to serve Columbia and any other customer within the geographic

territory allocated to it in the 1972 Agreement as approved by the order of the PUC; and 3) that PGE is immune from antitrust liability with respect to the 1972 Agreement.

PGE argues that the statutes providing for territorial allocation do not require the words "exclusive territorial allocation' or other similar words be used in the 1972 Agreement. PGE argues that the 1972 Agreement is, in fact, a contract as contemplated by O.R.S. 758.410(1) which allocates exclusive service territories. PGE argues that the 1972 Agreement is a lawful contract between two businesses who provide similar utility services. PGE argues that the 1972 Agreement is a contract for the purpose of allocating territories because the explicit purpose of the contract is to draw boundaries of service areas, and because the parties declare in the 1972 Agreement itself that they want to eliminate the duplication of services in those territories whose boundaries they have drawn. PGE contends that the 1972 Agreement specifically covers the allocation of customers in Section 7 and designates "which territories and customers are to be served by which of said contracting parties." O.R.S. 758.410(1).

PGE argues that the signators to the 1972 Agreement and all others involved, including the PUC, intended that the 1972 Agreement create exclusive service territories. PGE asserts that any question over the failure to expressly use the terms "exclusive service area" arose because the agreement was written by engineers and executives and not by lawyers.

PGE asserts that the creation of exclusive service territories does not conflict with the Charter of the City of Portland. PGE further asserts that the doctrine of state action immunizes the creation of exclusive service territories in the State of Oregon from the confines of the federal antitrust laws because the restraint shown here has been clearly articulated and affirmatively expressed as the policy of the State of Oregon by the PUC; that the order of the PUC approves the territorial allocation of the City of Portland; and that the laws of the State of Oregon provide for the active supervision of territorial allocations such as this one.

PGE admits that it was an oversight not to refer to Chapter 758 in the application that was made to the PUC for the territorial allocations, but argues that it was a technical defect that should be overlooked by the court. PGE explains that the reference to Chapter 757 may have been caused by the renumbering of Chapter 757 and 758 which occurred about that time. In any case, PGE contends that the requirement that the appropriate statutory reference be cited to the PUC is a rule of the PUC and has not been imposed by the legislature. PGE contends that the PUC did not find the defect significant in that it exercised jurisdiction over the transfer of customers which is authorized by Chapter 758 despite the fact that the statute was not properly identified in the application. PGE argues that notwithstanding the proceedings before the PUC, these proceedings were in substance conducted under Chapter 758 despite the defect in label.

POSITION OF THE PUC

The PUC takes no position on the motion for summary judgment filed by Columbia, but submits a memorandum which states the following three positions which are contrary to the arguments made by Columbia: 1) statutes relating to territorial allocation apply to the City of Portland ; 2) one of the purposes of the statutes relating to territorial allocation is to displace competition statewide; and 3) the laws of the State of Oregon allow for the active supervision of the displacement of competition under territorial allocation statutes.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that

there remains as issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).

ANALYSIS

In Parker v. Brown, 317 U.S. 341, 351 (1943), the United States Supreme Court declared that there was "no hint that [the Sherman Act] was intended to restrain state action or official action directed by a state." In California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), the Court explained that its decisions "establish two standards for anti-trust immunity under Parker v. Brown. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." (Citations omitted).

The Oregon Legislature, in enacting O.R.S. 758.400 to 758.475, has provided for the allocation of territories and customers or utilities providers. O.R.S. 758.405 states the legislative purpose for enacting statutes that provide for the allocation of territories and customers of utilities providers as follows:

> The elimination and future prevention of duplication of utility facilities is a matter of state-wide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services.[1]

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[1] The purpose of the Oregon legislature in enacting these statutes was to address a statewide issue. O.R.S. 470.470(1) preserves the right of a city to exercise its franchise power to say "yes" or "no" to a utility

O.R.S. 758.410, which is applicable to the facts of this case, provides, in relevant part, as follows:

> (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers so allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could economically served by then existing facilities of either party, or by reasonable and economic extensions thereto.

O.R.S. 758.400 to 758.475 articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity. The PUC closely supervises compliance with these statutes and with the policy of the State of Oregon. To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, O.R.S. 758.400 to 758.475, that provider is immune from antitrust violations.

The difficult issue presented by this case is whether the 1972 Agreement was "for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties" as provided in O.R.S. 758.410(1).

O.R.S. 758.400(1) states that "'[a]llocated territory' means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the

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company seeking permission to operate within the city. There is no basis for this court to conclude that the provisions of O.R.S. 758.400 to 758.475 do not apply to utilities lawfully operating within the City of Portland.

commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

PGE relies on the fact that the 1972 Agreement and the order of the PUC each state that the elimination of duplicate electrical facilities is the purpose behind the exchange of facilities. The 1972 Agreement states in the initial preamble: "WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric utility facilities in the foregoing areas." Exhibit K to Marshall Affidavit, p. 1. The order of the PUC explains:

> In the Portland areas affected by the transfer, both Portland General and Pacific have service extensions scattered throughout such areas. Both utilities have transmission and distribution facilities running throughout the area, often side by side or on the same poles. The individual facilities of either company are generally sufficient now or with minor modification to serve all customers in the area independently. Elimination of duplicating facilities will allow a more efficient and economical use of the respective companies' utility facilities.

Exhibit O to Marshall Affidavit, p. 3.

The state statutes require, however, that the allocation of territory must be "established by an order of the commission approving an application for the allocation of territory." O.R.S. 758.400(1). The order of the PUC relevant to this action states

initially that "[o]n August 8, 1972, the Commissioner accepted for filing a joint application by [Pacific] and [PGE] for an order or orders approving and authorizing . . . [t]he exchange of electric utility property and service facilities located in Multnomah and Columbia Counties." Exhibit O to Marshall Affidavit, p.2. The conclusion of the PUC order provides, in relevant part, that:

> Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant . . . within the boundaries of Parcel A . . . and within the boundaries of Parcel B . . . and that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant . . . within the boundaries of Parcels A and B.

Exhibit O to Marshall Affidavit, p.8 (emphasis added).

The order of the PUC authorized the "exchange of electric utility property and service facilities" within the parcels of land indicated. The order of the PUC reflects the fact that the parties agreed in the 1972 Agreement only to an exchange of facilities within the area relevant to this action. the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the provision of exclusive services and limited their rights to operate within the parcels in the future. The order of the PUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

The purpose of the doctrine of state action was to allow a state to authorize certain acts not otherwise open to private parties. It would be contrary to the purpose of the doctrine of state action to allow private parties to claim monopolies that have not been specifically and clearly authorized by relevant statutory process.

CONCLUSION

The court concludes that Columbia is entitled to a declaration that Order #72-870 of the PUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia.

The motion for partial summary judgment of Columbia (#72) is granted. The cross-motion for summary judgment of PGE (#82) is denied.

DATED this 3 day of July, 1991.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX F

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	
v.	)	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS,	)	O P I N I O N [Entered February 9, 1993]
Defendants.	)	

FRYE, Judge:

The matters before the court are 1) the motion of defendant Portland General Electric Company (PGE) for summary judgment (#262); and 2) the cross-motion of plaintiff, Columbia Steel Casting Co., Inc. (Columbia Steel), for summary judgment (#269).

FACTS

On July 18, 1972, PGE and Pacific Power & Light Company (PP&L) entered into an agreement to exchange electrical distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement). The 1972 Agreement provides, in part:

> NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:
>
> 1. Exchange of Facilities
>
> (a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A and described in Exhibit C, and in the area designated as Parcel C, shown on exhibit A and described in Exhibit B; excluding, however: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.
>
> (b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from

Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities described under the streetlight plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General's Station L to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

. . . .

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other a list of the transferred customers, together with accounting, billing, service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

Exhibit K to Affidavit of L. Guy Marshall (Marshall Affidavit), pp. 2-3, 9.

Prior to the time that PGE and PP&L entered into the 1972 Agreement, The City of Portland had consented to the agreed exchange of electrical distribution properties and customer accounts in Ordinance 134416 enacted on April 26, 1972. That ordinance provides, in part:

> An Ordinance consenting to exchange of certain property within the City between Portland General Electric Company and Pacific Power & Light Company on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.
>
> The City of Portland ordains:
>
> Section 1. The Council finds that both Portland General Electric Company and Pacific Power & Light Company operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes which results in some areas in doubling the number of such poles and wires and appurtenances causing interference with view and some accidental breakage of such wires or poles, and additional investment which increases the rate bases upon which said companies are entitled to earn a profit; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an

> interchange of properties between the companies should be permitted as hereinafter set forth . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between Portland General Electric and Pacific Power & Light Company as follows.

Exhibit J to Marshall Affidavit, p. 1

In Order No. 72-870 entered on December 15, 1972, the Oregon Public Utilities Commission (the OPUC) approved the exchange of electrical distribution properties and customer accounts entered into by PGE and PP&L:

> [T]he application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore
>
> ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further
>
> ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the

boundaries of Parcel A as described in Appendix "A," and within the boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core area . . ..

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that

agreement between the companies therein, dated July 18, 1972.

Exhibit O to Marshall Affidavit, pp. 8-9.

The 1972 Agreement was negotiated by a team of employees from PP&L and PGE, all of whom testified in depositions taken in this action that, in their opinions, the purpose of the 1972 Agreement was to establish secure and exclusive service territories within the City of Portland.

At the time that the 1972 Agreement was signed, Columbia Steel purchased electricity from PGE pursuant to an Agreement for Electric Power Service. The Agreement for Electric Power Service is a contract which is automatically renewed on a yearly basis unless and until one party provides to the other party timely written notice of the termination of the agreement. In 1980, Columbia Steel and PGE renewed the agreement for a five-year period, with an option to either party thereafter to renew the agreement on a yearly basis or to terminate the agreement on July 1 of any given year, so long as thirty days notice is provided by the terminating party to the other party.

In the years since the parties signed the 1972 Agreement, PGE has acted consistently with its stated belief that it had the exclusive right to serve the City of Portland within which Columbia Steel was located.

In the years after the 1972 Agreement was signed and after the OPUC issued Order No. 72-870, the OPUC has acted to prevent PGE from duplicating distribution facilities in the territory serviced by PP&L, and vice versa, with the intended effect of eliminating competition in the provision of electric services in the territories which were the subject of the transfer of electrical distribution properties and customer accounts in the 1972 Agreement.

PGE sets only those rates and offers only those electric services that are contained in tariffs approved by OPUC. PGE files the desired rates with the OPUC, but the OPUC sets the rates. The retail rates charged by PGE for electric services and the electric services provided by PGE between 1972 and the

present have been approved by the OPUC. Furthermore, PGE must receive prior approval from the OPUC before it can transfer a customer to another provider of electrical services.

For several years after 1972, there was no significant differences in the rates charged by PGE and PP&L for electric services. Therefore, customers had no incentive to seek to change providers. In the 1980's, the rates that PP&L charged its industrial customers were lower than the rates PGE charged its industrial customers. The rates that PP&L charges today are lower than the rates PGE charges. In the 1980's, Columbia Steel began to examine the possibility of obtaining electrical services from a source other than PGE.

In February, 1987, Columbia Steel requested PP&L to provide electric services to it. PP&L contacted PGE to discuss the matter. Columbia Steel made a number of telephone calls to PP&L and was ultimately told that the territories had been divided up and PP&L did not serve the territory in which Columbia Steel was located.

In 1987, Columbia Steel learned of the possibility of becoming the assignee of a direct service, industrial power supply contract between the Bonneville Power Administration (BPA) and Pacific Carbide and Alloys Company. PGE stated its opposition to the assignment of the industrial power supply contract between the BPA and Pacific Carbide and Alloys Company to Columbia Steel. The BPA concluded that it would not be in the best interest of the BPA to facilitate the request of Columbia Steel.

In late 1989, Columbia Steel again requested PP&L to provide electric services to Columbia Steel. PP&L examined the request and decided it would consider the request of Columbia Steel. PP&L then informed PGE that PP&L would make an offer to provide electric services to Columbia Steel.

In 1990, Columbia Steel and PP&L entered into negotiations, the goal of which was to have PP&L, rather than PGE, furnish electric services to Columbia Steel. In April, 1990, PP&L notified Columbia Steel that it would offer Columbia Steel an electrical power contract. PGE continued to

oppose efforts by Columbia Steel to change the supplier of electric services from PGE to PP&L.

On May 30, 1990, legal counsel for Columbia Steel wrote the following letter to the senior vice president and general counsel for PGE:

> On behalf of my client, Columbia Steel Casting Company, Inc. (Columbia), this letter is to request that Portland General Electric Company (PGE) begin the transfer of power delivered by Pacific Power & Light Company (Pacific) to PGE for service to Columbia beginning at 12:00:01 a.m. on July 1, 1990.
>
> As you know, Pacific has concluded that it must respond affirmatively to Columbia's request that it begin power sales to Columbia upon the expiration of its power sales contract with PGE on July 1, 1990. Pacific has promised to begin power sales upon the execution of a power sales contract. PGE has announced that it may seek to prevent such deliveries through litigation. Due to PGE's continuing assertion of the exclusive right to serve Columbia, Pacific has not heretofore constructed a substation in the vicinity of Columbia's plant. [Pacific] therefore will not be in a position to begin deliveries on July 1, 1990, absent access to PGE's transformers and conductor facilities serving Columbia's plant.
>
> If Columbia is right in its view that the OPUC's 1972 Order did not serve to lawfully divided PGE and Pacific's service territories, then Columbia could be incurring additional damages (and PGE could be incurring additional anti-trust liability) while Columbia is unable to take delivery of the power that Pacific has offered to deliver.

> Since the PGE facilities that are needed to serve Columbia have surplus capacity, PGE will not be required to disadvantage its own customers to provide access to these facilities.
>
> If PGE is confident of its legal position, it would seem prudent to have PGE continue energy deliveries (albeit Pacific's power) over its facilities, pending a judicial resolution of this dispute. Columbia and Pacific are prepared to enter into an agreement with PGE to pay PGE lost margins if PGE prevails. If Columbia should prevail in the litigation, then Pacific would build a substation and begin to provide service to Columbia directly over Pacific's own facilities.
>
> Please let me know as soon as possible the means by which temporary delivery of power can take place over PGE's facilities. As you know, the "evergreen" provisions of PGE's power sales contract with Columbia require Columbia to provide 30 days advance notice in writing to terminate the contract on the anniversary date. By my calculation, Columbia must provide such notice to PGE on or before May 31, 1990.

Exhibit 55 to the Affidavit of Allan M. Garten, pp. 1-2.

On the same date, May 30, 1990, legal counsel for PGE wrote back to legal counsel for Columbia Steel as follows:

> Leonard Girard [Vice President and General Counsel of PGE] asked us to respond to your letter of May 30, 1990. We do not read your letter as a termination of any contract rights by your client, Columbia Steel Casting Company, Inc. If we are incorrect in that respect, please notify Portland General Electric Company ("PGE"). Your client is

> within PGE's exclusive service territory. If it desires to purchase electricity, it must do so from PGE - either pursuant to contract or PGE's Schedule 32 Tariffs.

Id. at 3.

On the same date, legal counsel for Columbia Steel responded to legal counsel for PGE, in relevant part, as follows:

> I have received your letter of May 30, 1990. You are correct that my letter to Leonard Girard did not serve as a termination of the Columbia Steel/Portland General Electric Company (PGE) contract. Columbia reserves the right to provide a future notice of termination under the terms of its contract with PGE. We are still hopeful of some amicable resolution of this matter.

Id. at 4.

On May 31, 1990, PP&L filed an action in this court, Civil No. 90-524-FR, seeking a judicial declaration of the rights and obligations of PGE, Columbia Steel, and the OPUC under the 1972 Agreement and the Sherman Antitrust Act.

On June 19, 1990, Columbia Steel filed this action, Civil No. 90-592-FR, against PGE, PP&L and OPUC seeking a judicial declaration that Columbia Steel may terminate its agreement with PGE and purchase electric services from PP&L; that PGE does not have an exclusive right to serve Columbia Steel under the terms of the 1972 Agreement; and that the Order No. 72-870 of the OPUC neither empowers nor authorizes PGE to monopolize the sales of electric services to Columbia Steel nor serves to foreclose PP&L from providing electric services to Columbia Steel.

On July 2, 1990, PGE filed a three-part application with the OPUC asking the OPUC to 1) issue a declaratory order affirming that Order No. 72-870 of the OPUC, which was

issued on December 15, 1972, allocates exclusive territory to PGE in the City of Portland; 2) issue an order approving a 1972 Agreement between PGE and PP&L which allocates certain territory in the City of Portland to PGE; and 3) allocate certain territory in the City of Portland to PGE on the basis of the years of continuous service that PGE had provided electric services to that territory pursuant to O.R.S. 758.435.

On July 25, 1990, City of Portland and PP&L executed a contract, under the terms of which PP&L was to provide electric services to Columbia Steel.

On May 2, 1991, PGE and PP&L entered into a settlement agreement, in which PGE agreed to transfer the electric services provided by PP&L to Columbia Steel through the facilities of PGE for a period not to exceed twenty-eight months. The transfer of Columbia Steel as a consumer of electric services from PGE to PP&L was a part of a settlement agreement between PGE and PP&L in Civil No. 90-524-FR, which had been filed by PP&L. The settlement agreement provided for transfer by PP&L to PGE of property of equal value to the revenues likely to be produced from PP&L's sale of electric services to Columbia Steel. The settlement agreement was approved by the OPUC after the OPUC assured itself that there would not be a duplication of facilities.

Since July, 1991, Columbia Steel has purchased electric services from PP&L, but the electric services have been delivered by PGE.

On July 3, 1991, this court issued an Opinion and Order finding that Columbia Steel was entitled to a declaration tat Order No. 72-870 of the OPUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991) (*Pacificorp*).

In *Pacificorp*, this court found that PGE and PP&L had entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement); that the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the

provision of exclusive services and was not a contract that limits their rights to operate within certain areas in the future; and Order No. 72-870 of the OPUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

On April 16, 1992, the OPUC issued Order No. 92-557, which stated:

> because Order No. 72-870 did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, Order No. 72-870, perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.
>
> For the foregoing reasons, it appears to the Commission that Order No. 72-870 is not a complete and accurate memorial of the 1972 decision of the Commissioner in docket No. UF 2947: the order omits a reference to the statute under which its findings were actually made when the Commissioner approved the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend Order No. 72-870, nunc pro tunc, to conform to the actual decision intended and followed.

Order No. 92-557 of the OPUC, pp. 14-15.

The OPUC then ordered that:

1. Order No. 72-870 is hereby corrected by striking the following paragraph from page eight;

> "From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore"

and substituting the following language:

> "From the foregoing, it is concluded that the applications of Pacific Power & Light Company and Portland General Electric Company should be granted, and an order entered as follows:
>
> 1. Under ORS 758.460, approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company;

> 2. Under ORS 758.425, approving the agreement of the companies, which separates service territories and transfers affected customers; and
>
> 3. Under ORS 757.480, approving the exchange of assets and facilities to implement these transactions. It is therefore"
>
> 2. The correction to Order No. 72-870 is hereby entered nunc pro tunc as of December 15, 1972, the date when the decision was originally made and entered.

Id. at 20-21.

On June 29, 1992, this denied the motion of PGE for reconsideration. PGE had argued that this court should reconsider and vacate that portion of its Opinion and Order of July 3, 1991 in which it found that exclusive service territories were not created by the OPUC in 1972. PGE had argues that it was entitled to summary judgment in its favor on the grounds of its defense of immunity under the doctrine of state action immunity even if there were ambiguities in order No. 72-870 of the OPUC.

On June 29, 1991, this court denied the motion of PGE for reconsideration. The court concluded that Order No. 92-557 filed by the OPUC on April 16, 1992 does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized in July, 1991 when this court decided that Columbia Steel was entitled to a declaration that Order No. 72-870 of the OPUC neither empowered nor authorized PGE to monopolize the service of electrical power to Columbia Steel.

CONTENTIONS OF PGE

PGE contends that it is entitled to an order of summary judgment in its favor on the grounds that 1) when the 1972

Agreement was approved by the OPUC, it eliminated further competition between PGE and PP&L for existing customers in the City of Portland; 2) after the 1972 Agreement divided the City of Portland into two distinct areas and the duplication of facilities was eliminated, regulatory policy and practice prohibited subsequent competition between PGE and PP&L for existing customers; 3) PGE did not monopolize the service of electric power to Columbia Steel because it did not exclude all competition or control prices; 4) PGE never attempted to conceal its position that it had an exclusive service territory, and Columbia Steel was on constructive, if not actual, notice of the position of PGE; and 5) Columbia Steel has suffered no damages.

CONTENTIONS OF COLUMBIA STEEL

Columbia Steel contends that it is entitled to an order of summary judgment in its favor on the grounds that 1) PGE conspired with others to commit a per se violation of the antitrust laws by the implementation of the 1972 Agreement; 2) PGE monopolized power in the relevant market in violation of antitrust laws; 3) Columbia Steel was damaged by the unlawful monopolization of power by PGE; 4) the statute of limitations does not bar the claims of Columbia Steel because of the fraudulent concealment by PGE; 5) the interactions of PGE with state regulators does not afford a defense to the antitrust law violations; and 6) the rate cases and Order No. 92-557 of the OPUC which are relied upon by PGE do not stop Columbia Steel from proceeding in this case.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact.

Once the initial burden of the moving party is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party must make a sufficient showing on all essential elements of the case with resect to which the non-moving party has the burden of proof. *Id.*

The decision faced by the court is essentially the same decision faced by a court on a motion for a directed verdict -- that is, whether the evidence on the motion for summary judgment presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If reasonable minds could differ as to the conclusions drawn from the evidence in the record, the motion for summary judgment should be denied. *Id.*

ANALYSIS

On July 3, 1991, this court issued an Opinion and Order finding hat Columbia Steel was entitled to a declaration that Order No. 72-870 of the OPUC neither empowered nor authorized PGE to monopolize the service of electric power to Columbia Steel. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 571 (D. Or. 1991) (*Pacificorp*).

In *Pacificorp*, this court found that PGE and Pacificorp entered into an agreement to exchange electric distribution properties and customer accounts in certain defined areas within and around the City of Portland (the 1972 Agreement); that the 1972 Agreement was not a contract whereby the parties allocated territories and customers within those areas for the provision of exclusive services and was not a contract that limited their rights to operate within the areas in the future; and that Order No. 72-870 of the OPUC did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party.

These findings constitute the law of the case and require no revisitation.

On June 29, 1991, this court found that Order No. 92-557 filed by the OPUC on April 16, 1992, did not alter the order of this court filed on July 3, 1991 that Columbia Steel was entitled to a declaration that Order No. 72-870 neither empowered nor authorized PGE to monopolize the service of electric power to Columbia Steel.

These findings constitute the law of the case and require no revisitation.

PGE admits that employees of PGE believed that the 1972 Agreement was intended to, and did in fact, create exclusive service territories. There was no question that after the 1972 Agreement was signed, the conduct of PGE and others was based upon the belief that competition for the provision of electric services had been eliminated. PGE continues to argue that exclusive service territories were created in 1972, despite the ruling of the court to the contrary.

PGE relies upon other orders of the OPUC, such as Order No. 74-658, as well as the recognition of other agencies, such as the Federal Power Commission, to demonstrate that the belief of employees at PGE that competition had been eliminated was reasonable. However, the issue is not whether the belief of employees of PGE and other that the 1972 Agreement and Order No. 72-870 of the OPUC eliminated competition was a reasonable belief. This court has ruled that the 1972 Agreement and Order No. 72-870 of the OPUC did not have the legal effect of eliminating competition. The court has never ruled or implied that PGE acted in bad faith, but no belief however reasonable it may have been, alters the legal effect of the 1972 Agreement and Order No. 72-870 of the OPUC.

PGE contends that this action should be dismissed because it is barred by Section 4(B) of the Clayton Act, 15 U.S.C. § 15(b), which allots four years from the date of accrual of a cause of action in which to bring an antitrust suit. There is no question that the 1972 Agreement and Order No. 72-870 of the OPUC occurred more than four years prior to this action. Columbia Steel, however, alleges that this action is not barred because 1) PGE participated in a continuing conspiracy in

violation of Section 1 of the Sherman Act; and 2) fraudulent concealment by PGE tolls the statute of limitations.

The court will first address the claim of Columbia Steel of fraudulent concealment on the part of PGE. Columbia Steel asserts that the following facts support its claim of fraudulent concealment:

> 69. No one at Columbia Steel ever read Order No. 72-870 until after counsel were engaged in September 1988 to explore alternatives to PGE service. prior to that time, Columbia Steel representatives reasonably believed defendant's assertions that PGE had the exclusive right to serve Columbia Steel.
>
> 70. Guy Marshall, joined Columbia Steel as Director of Corporate Policy in September 1989. Prior to that time, he had no involvement with Columbia Steel on energy matters. After counsel were engaged, and supplied him with the historical materials and advice, Mr. Marshall reached the conclusion that PGE had no exclusive service territory.

Columbia Steel's Statement of Material Facts in Opposition to PGE's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment, pp. 25-26 (citations omitted).

Columbia Steel asserts that the affirmative assertions of PGE of an exclusive right to serve constitute the sort of "affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Columbia Steel also relies upon a case in which the court concluded that "where there is a fiduciary duty to disclose information on a particular matter, failure to do so

will constitute fraud or fraudulent concealment that tolls the statute of limitations on any claim as to notice of which that information is material." *Riddell v. Riddell Washington Corp.*, 866 F 2.d 1480, 1496 (D.C. Cir. 1989).

There is no evidence to support a finding that PGE had a fiduciary duty to disclose any further information to Columbia Steel in this case. The facts are undisputed that when Columbia Steel chose to do so, Columbia Steel retained counsel and reviewed the appropriate, publicly available documents and formed its own opinion as to the exclusive right of PGE to serve Columbia Steel. There is no evidence in this case to support a claim for fraudulent concealment by PGE. The claim made by Columbia Steel in this case is limited to a continuing conspiracy within the applicable four-year statute of limitation period.

"[E]ven when a plaintiff alleges a continuing violation, an overt act is required to restart the statue of limitations and the statute runs from the last overt act." *Pace Indus. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). If no overt act in furtherance of the conspiracy occurs within the limitations period, the action is barred.

An overt act in furtherance of a continuing conspiracy will only restart the statute of limitations if it passes a two-part test: "1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Id.* at 238.

> The Ninth Circuit determines the accrual of civil conspiracies for limitations purposes in accordance with the last overt act doctrine. Under this doctrine, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy'." Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff, and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." Accordingly, plaintiffs may recover only for the

> overt acts . . . that they specifically alleged to have occurred within the . . . limitations period.

Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986) (citations omitted).

Columbia Steel has alleged two acts which took place within the limitations period: 1) PP&L refused service in approximately February, 1987; and 2) PGE orally refused to transfer power as requested to PP&L, and then did so in writing in May, 1990.

PGE asserts that each of these acts was a mere reaffirmation of positions taken earlier by the respective utilities and do not restart the running of the statute of limitations period. PGE asserts that Columbia Steel has suffered no new and accumulating injury within the limitations period. PGE asserts that even if Columbia Steel's claim is not wholly time barred, Columbia Steel may only recover for damages for the overt acts in furtherance of the conspiracy which occurred within the four-year statute of limitations period.

Columbia Steel can recover damages caused by the overt acts of PGE which occurred within the statute of limitations period, or in this case four years prior to the filing of this action on June 19, 1990. Columbia Steel cannot recover damages from PGE because PP&L refused service in February, 1987. There is no evidence that Columbia Steel contacted PGE in February, 1987 or that PGE refused a request by Columbia Steel to transfer power to another provider in February, 1987. Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE.

On May 30, 1990, Columbia Steel wrote to PGE stating that it was ready to terminate its contract with PGE and take power form PP&L as of July 1, 1990, if PGE would agree to make its substation available to allow the delivery of the power that PP&L offered to deliver. At this point, Columbia Steel had made other specific arrangements, and PGE refused to allow the

transfer asserting that "if [Columbia Steel] desires to purchase electricity, it must do so from PGE." Exhibit 55 to the Affidavit of Allan M. Garten, p.3. This refusal to consider a specific request to transfer power was more than a mere reaffirmation of positions taken earlier and must be considered as an overt act within the statute of limitations period.

On July 25 1990, Columbia Steel and PGE executed a contact for electric services, but it was not until July, 1991 that Columbia Steel began to purchase power delivered from PGE from PP&L. The court finds that the damages in this case are limited to the additional costs incurred by Columbia Steel for electric services during the one-year period of time in which Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L, but was unable to do so because of PGE's assertion of an exclusive service territory.

There is no evidence in this case which would support a claim from Columbia Steel for additional damages resulting from the earlier inquiries made by Columbia Steel to obtain electric services from source other than PGE.

There are no other grounds upon which Columbia Steel is barred from recovering the actual damages it incurred as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel prior to July, 1991.

CONCLUSION

The court concludes that Columbia Steel is entitled to recover the actual damages it incurred as a direct result of the assertion by PGE of an exclusive right to provide electric services to Columbia Steel prior to July, 1991. Damages in this case are limited to the additional costs incurred by Columbia Steel for electric services from July 25, 1990 to July, 1991, during which time Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L but was unable to do so because of PGE's assertion of an exclusive service territory.

PGE's motion for summary judgment (#262) is granted in part and denied in part. Columbia Steel's cross-motion for summary judgment (#310) is granted in part and denied in part.

The parties shall consult and attempt to agree as to the amount of damages based on this opinion. Any agreement as to the amount of damages shall not be construed by this court or by any other court as any concession of a contrary position taken at any earlier time in this case. The parties have thirty days to attempt to resolve this issue. At the end of thirty days, if no agreement can be reached as to the amount of damages based upon the court's rulings herein, the parties shall present to this court their contentions, and the court will make further rulings.

DATED this 4th day of February, 1993.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX G

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	
v.	)	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS,	)	OPINION AND ORDER [Entered May 28, 1993]
Defendants.	)	

FRYE, Judge:

The matters before the court are 1) the motion of defendant Portland General Electric Company (PGE) for reconsideration and notice of related case (#323); and 2) the cross-motion of the plaintiff, Columbia Steel Casting Co., Inc. (Columbia Steel), for reconsideration (#337).

PGE moves the court for reconsideration of the court's opinion and order of February 4, 1993 granting summary judgment in part to PGE and in part to Columbia Steel on the grounds that, on February 9, 1993, the Honorable Richard D.

Barber, a Marion County Circuit Court Judge, issued an opinion in Columbia Steel Casting Co. v. Public Util. Comm'n of Or., Marion County Circuit Court Case No. 92C-12005, in which he affirmed the two orders issued by the Oregon Public Utilities Commission in 1992.

Columbia Steel asks this court to reconsider that part of its opinion and order of February 4, 1993 in which the court concludes that Columbia Steel cannot recover damages from PGE for actions taken or not taken by Pacific Power & Light Company (PP&L).

APPLICABLE STANDARD

A motion for reconsideration must demonstrate some reason why the court should reconsider its decision. The motion must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Courts have distilled three major grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent manifest injustice. All Hawaii Tours Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 648 (D. Haw. 1987), rev'd in part on other grounds, 855 F.2d 860 (9th Cir. 1988).

ANALYSIS AND RULING

The decision of Judge Barber does not alter the conclusion of this court that the "claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that Order No. 72-870 neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel." Opinion of June 29, 1992, pp. 8-9. There is no state action upon which PGE may rely to evade liability in this case.

The court has reviewed all the arguments made in support of and in opposition to the motions to reconsider and finds that there are no facts which require reconsideration. The court will adhere to its prior ruling. The parties are ordered to make a

good faith effort to agree upon the amount of damages, neither party waiving their prior agreements as to liability. The court will then enter a judgment, and the parties may proceed to the appellate level.

CONCLUSION

PGE's motion for reconsideration and notice of related case (#323) is DENIED. Columbia Steel's cross-motion for reconsideration (#337) is DENIED.

IT IS SO ORDERED.

DATED this 28th day of May, 1993.

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX H

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, JOAN SMITH, and RONALD EACHUS, Defendants.	Civil No. 90-524-FR (LEAD) Civil No. 90-592-FR O P I N I O N [Entered August 11, 1993]

FRYE, Judge:

The matter before the court is the resolution of issues related to the motion of Columbia Steel Casting Co., Inc. for the entry of final judgment under Fed. R. Civ. P. 54(b) (#353).

BACKGROUND

On February 5, 1993, this court held that Portland General Electric Company (PGE) was liable to Columbia Steel Casting Co., Inc. (Columbia Steel) for damages sustained by Columbia

Steel from July 25, 1990, when Columbia Steel and Pacific Power and Light Company (PP&L) executed a contract whereby PP&L was to provide and Columbia Steel was to receive electric services provided by PP&L. The court directed the parties to "consult and attempt to agree as to the amount of damages" that PGE was to pay to Columbia Steel. Opinion, February 5, 1993, p. 26: Order, February 5, 1993, p. 2. Each of the parties filed a motion for reconsideration.

After considering the motions of the parties for reconsideration of the court's holding of February 5, 1993, the court again directed the parties to "make a good faith effort to agree on the amount of damages" that PGE was to pay to Columbia Steel. Opinion and Order, May 28, 1993, p. 4.

On July 9, 1993, the parties filed a document entitled "Columbia Steel Casting Co., Inc.'s and Portland General Electric Company's Stipulation Regarding Damages Calculation and Attorney Fees and Costs," which sets out the facts agreed to by the parties which form the basis of the continuing legal dispute between the parties.

Prior to the entry of judgment, the court must resolve the disputes remaining between the parties which relate to the following three issues: 1) the appropriate measure and amount of damages; 2) the appropriate award of costs, including reasonable attorney fees; and 3) the appropriate form of judgment.

1. The Appropriate Measure and Amount of Damages

Columbia Steel contends that the total amount of damages it suffered is $261,469, and that pursuant to 15 U.S.C. § 15(a), that sum must be trebled.

PGE contends that the court should award damages to Columbia Steel in the sum of $169,475.

From 1979 through 1990, additional meters were added until, in April, 1990, Columbia Steel was receiving power from PGE through five electrical meters. When PP&L begins to deliver electric services to Columbia Steel, the method of delivering electric power through five electrical meters will be

replaced by a method of delivering electric power through two electrical meters.

Columbia Steel contends that its award of damages should take into account the fact that it will ultimately have a two-meter method of service, which adds $81,657 in damages related to the costs associated with the conversion from the five-meter method of service provided by PGE to the two-meter method of service provided by PP&L.

PGE argues that the costs of the conversion from a five-meter method of service to a two-meter method of service is a capital improvement cost, which cannot be claimed as damages in this case.

In its opinion of February 5, 1993, at pages 24-25, this court concluded:

> On July 25, 1990, Columbia Steel and [PP&L] executed a contract for electric services, but it was not until July, 1991, that Columbia Steel began to purchase power delivered from PGE from PP&L. The court finds that the damages in this case are limited to the additional costs incurred by Columbia Steel for electric services during this one-year period of time in which Columbia Steel was willing and able to actually purchase power at a lower rate from PP&L, but was unable to do so because of PGE's assertion of an exclusive service territory.

The court finds that there is no basis to award as damages to Columbia Steel the costs which may have been incurred by Columbia Steel in converting and improving the system by which it receives electric services. The court finds that the damages are the difference between the rates charged by PGE and PP&L for the period from July 25, 1990, through July 15, 1991, under the five-meter points of delivery, which is $169,475, and that this sum should be trebled pursuant to 15 U.S.C. § 15(a).

2. The Appropriate Award of Costs, Including Reasonable Attorney Fees

[omitted]

3. The Appropriate Form of Judgment

Columbia Steel moves the court to enter judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in order to allow an immediate appeal. Columbia Steel argues that the claims it made pursuant to Section 2 of the Sherman Act were not resolved by the findings of this court in its Opinion of February 5, 1993 relating to the Section 1 conspiracy claim. Columbia Steel argues that "[w]hen this court's rulings are affirmed on appeal, and PGE has paid the judgment ordered by this Court, Columbia Steel will dismiss all remaining claims in this court." Columbia Steel's Reply memorandum in Support of Motion for Entry of Judgment Under Fed. R. Civ. P. 54(b), p. 17.

PGE contends that the entry of judgment under Rule 54(b) is not appropriate, and that this court should enter a final judgment. PGE explains that the damages under both Section 1 and Section 2 are identical and have been resolved. In addition, PGE argues that the claims under Section 1 and Section 2 are based upon a single set of facts and do not constitute multiple claims under Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

In Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991), the court stated:

> Rule 54(b) certification is proper if it will aid "expeditious decision" of the case. The Rule 54(b) claims do not have to be separate from and independent of the remaining claims. However, rule 54(b) certification is scrutinized to prevent piecemeal appeals in cases which should be reviewed only as single units.

Id. at 797-98 (internal quotations and citations omitted).

The Section 2 claims have not been resolved in these proceedings. Certification of the judgment on the Section 1 claim in order to allow the appeal of the state action question will aid the expeditious resolution of this case because the issues involved in the Section 1 claim have been a major source of the controversy in this case. There does not appear to be any danger that inappropriate multiple appeals will result. While this court prefers to resolve all aspects of a case before an appeal, the provisions of Rule 54(b) apply in this case, and the court finds that Columbia Steel is entitled to the entry of judgment under Rule 54(b).

CONCLUSION

The motion of Columbia Steel for the entry of judgment under Fed. R. Civ. P. 54(b) (#353) is granted. Columbia Steel shall prepare the appropriate judgment.

DATED this 10th day of August, 1993

/s/_____

HELEN J. FRYE
United States District Judge

APPENDIX I

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	)	
Plaintiff,	)	Civil No. 90-524-FR (LEAD)
v.	)	Civil No. 90-592-FR
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; ROGER HAMILTON, JOAN SMITH, and RONALD EACHUS,	)	JUDGMENT PURSUANT TO FED. R. CIV. P. 54(B)
Defendants.	)	[Entered September 10, 1993]

WHEREAS the court entered an Opinion and Order dated February 4, 1993, finding defendant Portland General Electric Company ("PGE") liable in damages to plaintiff Columbia Steel Casting Co. ("Columbia Steel") for violations of § 1 of the Sherman Antitrust Act;

WHEREAS the Court entered an Opinion and Order dated May 28, 1993, denying both defendant's and plaintiff's motions for reconsideration of the February 4, 1993 Opinion and Order, and directed both parties to make a good faith effort to agree on the amount of damages;

WHEREAS the parties have filed their submissions on damages, and plaintiff has filed a petition for recovery of fees and costs, and motion for entry of judgment pursuant to Rule

54(b) of the Federal Rules of Civil Procedure;

THIS COURT HEREBY FINDS:

1. Plaintiff's claims under § 2 of the Sherman Act are still pending in this Court.

2. The issues resolved by the court in its February 4, 1993 Opinion concerns PGE's liability under § 1 and its defenses have been a major source of controversy in this case.

3. There does not appear to be any danger that inappropriate multiple appeals will result from certification of the § 1 claims for immediate appeal.

4. Entry of final judgment on the § 1 claims against PGE and certification of an appeal under Rule 54(b) would aid in the efficient and expeditious disposition of this case.

5. For the reasons stated above and in the Court's opinion of August 10, 1993, no just reason for delay exists for delaying entry of a final judgment on the § 1 claims against PGE in this case, and the interests of the parties and the courts will be served by an immediate entry of a final judgment pursuant to Rule 54(b) on those claims.

NOW, THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that the Clerk shall enter final judgment for the plaintiff Columbia Steel and against PGE in the amount of $169,475, to be trebled pursuant to 15 USC § 15, for a total of $508,425, plus the amount of $901,671.62 for costs and a reasonable attorney's fee, in accordance with and for reasons set forth in this Court's Opinion and Order of July 8, 1991, Opinion and Order of February 4, 1993, Opinion and Order of May 28, 1993 and Opinion and Order of August 10, 1993. Columbia Steel may file a supplemental petition for any additional fees and costs not covered by the Court's August 10, 1993 Opinion and Order within thirty days after entry of

judgment.

DATED this 8th day of September, 1993.

/s/_____
HELEN J. FRYE
United States District Judge

APPENDIX J

APPENDIX J

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 2947

In the matter of the joint application of PACIFIC POWER & LIGHT and PORTLAND GENERAL ELECTRIC COMPANY, for an order (1) approving and authorizing the exchange of electric utility facilities located in Multnomah and Columbia Counties, Oregon, and (2) approving the assignment to Portland General Electric Company of certain service territory in Columbia County, Oregon, previously allocated to Pacific Power & Light Company.	O R D E R No. 72-870 [Entered December 15, 1972]

On August 8, 1972, the Commissioner accepted for filing a joint application by Pacific Power & Light Company and Portland General Electric Company for an order or orders approving and authorizing:

1. The exchange of electric utility property and service facilities located in Multnomah and Columbia Counties.

2. The assignment from Pacific Power & Light Company to Portland General Electric Company of certain service territory heretofore allocated to

Pacific Power & Light Company by the Public Utility Commissioner.

On September 14, 1972, Notice of Hearing was issued and served on the applicants, other persons expressing an interest in this matter, and on the mayors of the cities involved, and releases announcing public hearings were made to the news media serving the areas affected.

Evidence was offered in behalf of applicants, the Public Utility Commissioner and other parties. The hearing was completed, the record closed and the matter submitted for determination. Based upon the evidence and record, it is found that:

Pacific Power & Light Company (Pacific) is a Maine corporation qualified to do business in Oregon. Pacific is an operating public utility which, among other things, is engaged in supplying electrical energy to customers in Oregon.

Portland General Electric Company (Portland General) is an Oregon corporation authorized to do business in Oregon. It is engaged in the business of supplying electrical energy to customers in Oregon.

Both Pacific and Portland General are public utilities subject to the jurisdiction of the Public Utility Commissioner of Oregon.

The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. The Commissioner's approval is also needed prior to the assignment of any allocated utility service territory pursuant to ORS 758.460.

On July 18, 1972, Pacific and Portland General entered into an agreement whereby an exchange of property and utility facilities would be made between the applicants in the City of

Portland and areas adjacent thereto and Pacific would transfer certain properties and facilities to Portland General in Pacific's Rainier Service District. This exchange and transfer also involves the transfer of customers from one party to the other.

Approximately 28,000 customers now served by Pacific will be served by Portland General, and 38,000 now served by Portland General will be served by Pacific. The City of Portland approved the exchange of property within its corporate boundaries conditioned upon Commissioner's approval by Ordinance No. 134416, passed by the City Council on April 26, 1972. With the cities' consent, Portland General will assign its franchise with the City of Maywood Park to Pacific, and Pacific will assign its franchise with the City of Rainier to Portland General.

The total original cost of the utility properties and facilities to be exchanged and the accumulated depreciation related thereto will be furnished to the Commissioner upon completion of a detailed inventory of all property subject to this agreement. It is presently estimated that the depreciated original booked cost of the property and facilities to be transferred to Pacific is $10,000,000 and of those to be transferred to Portland General is $14,500,000.

The companies state that the facilities acquired from each other will continue to be operated in the same manner as before the transfer.

In the Portland areas affected by the transfer, both Portland General and Pacific have service extensions scattered throughout such areas. Both utilities have transmission and distribution facilities running throughout the area, often side by side or on the same poles. The individual facilities of either company are generally sufficient now or with minor modification to serve all customers in the area independently. Elimination of duplicating facilities will allow a more efficient and economical use of the respective companies' utility facilities. While this may not

result in rate decreases for a number of reasons, it will have a tendency to reduce future revenue requirements for the benefit of the customers of the respective companies.

In addition to the above, removal of one set of electrical lines, poles and appurtenant facilities will improve the aesthetics of the area, have a beneficial environmental effect and assist in the long-range requirement and desirability for underground facilities.

The elimination of one set of energized wires from a joint use pole results in improved safety for employees working on the lines and for people in the area in case of downed lines or poles.

Transfer of the service territory, property and facilities of Pacific in the Rainier area to Portland general will result in more economical and reliable service. The area is isolated from the rest of Pacific's service area but is contiguous to Portland General's service area. Future expansion can more economically be made by Portland General.

The division of property and customers was made on the basis of revenue. After the exchange, each company should receive the same amount of annual revenue dollars to support its investment that it had before the exchange.

The exchange of facilities and the agreements governing such exchange and change over of service from one company to the other is by agreement between Pacific Power & Light Company and Portland General Electric Company, made and entered into on July 18, 1972. A copy of this agreement is included in and made a part of the application on file herein.

Parcel A and Parcel B, set forth in Appendix "A," attached hereto and by this reference made a part hereof, are descriptions of the boundaries of the service area within which Pacific is transferring to Portland General all the electric distribution

plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities and all easements necessary for the operation thereof. Excluded from the above transfer are: (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, which is designated as Parcel C, described in Appendix "A," and (2) certain duct lines owned, operated and maintained by Pacific extending Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Pacific is also transferring to Portland General the exclusively served area described as Parcel A in Appendix "A" (exclusively served area within Columbia County allocated by PUC Order No. 38498).

Appendix "B," attached hereto and by this reference made a part hereof, is a description of the boundaries of the service area within which Portland General is transferring to Pacific all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities and all easements necessary for the operation thereof and designated as Parcels A and B in Appendix "B." Excluded from the above are: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General's Station "L" to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

The companies submitted as part of their application, designated as Exhibit No. 1, a copy of the aforementioned agreement between Pacific and Portland General. The agreement and its attachments generally describe the properties, including real property, to be transferred and exchanged. It further sets forth the rights and obligations of each company with respect to joint use of certain transmission facilities; disconnections and reconnections and the cost thereof; repair,

maintenance and replacement of facilities; tabulation of units of property exchanged and the exchange or furnishing of maps and records related to the facilities transferred; transmission interconnects and metering equipment; distribution interconnects and metering systems; energy exchanges, the recording thereof and payment therefor; conveyance dates and transfer of customer accounts; proration of taxes; damage occurring to facilities prior to cutover; and injury to persons or damage to property of others and employees of the respective companies.

Parties protestant raised two issues which have significance in this proceeding:

First, the transfer or exchange of property between the two companies should not result in a change in valuation of the property on the exchange which would have the effect of changing the rate base for rate purposes. Any transfer herein will be subject to final inventory and valuation of the property exchanged and to the review of accounting methods used to record the transactions, all as approved by the Commissioner.

Second, the billing of customers by the company to which they were transferred should not result in any billing different than had the bill been rendered by the company previously serving the customer.

A third point raised by one industrial customer was that it is a Portland General customer on a Schedule 89 rate. Since Pacific does not have a schedule comparable to Schedule 89, Pacific will file with the Commissioner a special contract with this one industrial customer comparable to Schedule 89. This customer fears that in future rate proceedings this rate will be eliminated. This rate, when filed with the Commissioner, can only be changed with the Commissioner's approval.

It should be recognized that any rate or rate schedule is subject to change. The customer has no more assurance that the contract or scheduled rate would not be changed by Portland

General than it does with Pacific. Nevertheless, no change in rates may occur without the approval of the Commissioner, with an opportunity for a hearing, to which this customer, as any other, is entitled to adequate notification.

The agreements have been reviewed by the Public Utility Commissioner and nothing appears therein which is inconsistent with proper regulatory policy or practice except paragraph No. 7, transfer of customer accounts. The companies agreed to commence transferring customers' accounts and customers from one company to the other on July 24, 1972. At the time of hearing, October 2, 1972, all customers had purportedly been transferred.

This transfer and exchange was clearly done without the authority or approval of the Commissioner. The companies take the position that the transfer of customers from one company to another does not need the approval of the Commissioner. This is clearly in error.

Customers of a utility are not mere pawns to be moved at the convenience of the company. The customer is directly affected when any change may affect the quality or quantity of his service and what he pays for that service. There can be no question that the Commissioner has regulatory control over any such transfers or exchanges of customers.

In view of the fact that the overall best interests of the consumers are served by approval of this proposal, no action will be taken as to the untimely transfer of customers. Elimination of duplicate facilities, as mentioned previously, actually will result in aesthetic and economic benefits.

In addition, the Commissioner requires that the transfer of customers be accomplished without any inequities caused by variations in billing cycles. Each transferred customer is to be placed on a rate schedule equivalent to that on which he was prior to the transfer.

The customer being transferred will receive a final bill from the company formerly serving them. The bills will be issued to conform with the beginning of a full billing cycle with the company to which the customer is transferred. This means that some transferred customers will receive termination bills for more than a full billing cycle and some for a shorter period. In each instance, the bills are to be prorated so that the kilowatt hour blocks, minimum charges and special charges are adjusted to compensate for the changed billing cycle. The end result should be the customer paying the same amount for his service during the change-over period as if no transfer were made.

The companies' proposal is that those employees living in the territory being transferred to the other company are to be maintained on the respective hiring company's account as its own customers. This would be applicable only to employees living within the territories on the date of transfer. This method results in discrimination in that the company serving the area should serve all persons living in that area and, just because the customer is an employee of the utility, this should not permit him the right to choose which utility service he will take. The company may compensate their employees for the loss of their electric service discount; however, these employees, like any other customers in the area, must become the customers of the new utility serving the area.

In the case of residential schedules and most commercial schedules, a comparison of those of Portland General and Pacific reveals that the schedules are equivalent. In the few special situations where exact equivalency is not apparent, the companies have agreed to carry the customers on an equivalent schedule by means of a special contract and these contracts will be filed with the Commissioner.

The properties being transferred will be recorded upon the respective books of Pacific and Portland General, using the original cost of the properties, less related depreciation, in such a manner that plant balances on the respective utility books are

unchanged in total by the transfer of properties. The accounting will record the difference in the value of the property which Pacific transfers to Portland General and that which it receives from Portland General as an acquisition adjustment on Pacific's books. This adjustment will be amortized over the remaining life of the properties acquired. This same difference will be recorded on Portland General's books as an increase in its depreciation reserve. This accounting method allows elimination of possible penalties to rate payers of either company as a result of the difference in value of the property exchanged.

The proposed recording of the property transferred upon the respective utility's books is proper and in conformance with accepted utility accounting practices and procedures.

From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore

ORDERED that the application of Pacific Power & Light Company to transfer certain of its exclusively served area allocated to it and lying in and around Rainier, Oregon, to Portland General Electric Company is approved. Such assigned area is described as Parcel A in Appendix "A," attached hereto and made a part hereof; it is further

ORDERED that Pacific Power & Light Company may transfer to Portland General Electric Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities situated within or used for providing utility service within the boundaries of Parcel A described in Appendix "A," and within the

boundaries of Parcel B described in Appendix "A," excepting and excluding such facilities within an area commonly known as the Portland downtown core area, described as Parcel C in Appendix "A," and excepting and excluding certain duct lines owned, operated and maintained by Pacific Power & Light Company extending Pacific's Albina substation to Pacific's facilities within the Portland downtown core area; it is further

ORDERED that Portland General Electric Company may transfer to Pacific Power & Light Company all electric distribution plant, including distribution substations, poles, lines, transformers, meters and related distribution facilities and all easements necessary for the operation thereof used for providing service in or lying within the boundaries of Parcels A and B, described in Appendix "B," attached hereto and made a part hereof, excluding however: (1) facilities described under the street light plant account of the Uniform Systems of Account, except that leased area lights will be conveyed by Portland General Electric Company to Pacific Power & Light Company; (2) certain duct lines owned, operated and maintained by Portland General Electric Company extending from Portland General Electric Company's Station "L" to Portland General Electric Company's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting; it is further

ORDERED that the real property necessarily incidental to the transmission and distribution substations and the fee interest in easements may be conveyed to the respective parties as provided by agreement between the companies; it is further

ORDERED that the manner and method for accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be as provided by that agreement between the companies herein, dated July 18, 1972. However, the company employees living in the area being transferred to the other company shall become customers of the utility serving the area. (This does not

preclude the transferring company to compensate their employees for the loss of their electric service discount as a result of this transfer). It is further

ORDERED that, in each instance, the bills are to be prorated so that the kilowatt hour blocks, minimum charges and special charges are adjusted to compensate for the changed billing cycle. The result should have the customer pay the same amount for his service during the change-over period as if no transfer were made; it is further

ORDERED that the transfer of property approved herein shall be recorded upon the utilities' records in the manner set forth in the proposed entries filed with the application; and it is further

ORDERED that the respective applicants shall each file true copies of the final inventories and journal entries recording the transactions approved herein upon their respective books within 60 days after such transfer is consummated.

Made, entered and effective December 15, 1972.

_____

Diarmuid F. O'Scannlain
Public Utility Commissioner

APPENDIX "A"

RELATED AREAS - TRANSFER
FROM PACIFIC POWER & LIGHT COMPANY
TO PORTLAND GENERAL ELECTRIC COMPANY

PARCEL "A"

EXCLUSIVE SERVICE AREA
OF
PACIFIC POWER & LIGHT COMPANY
Rainier, Oregon

Beginning at a point which is the intersection of the northerly extension [continued metes and bonds description of property]

PARCEL "B"

Portland Area
PP&L to PGE

Beginning at a point on the Oregon-Washington State line and an extension of the east side of Sundial Ranch Road [continued metes and bounds description of property]

PARCEL "C"

EXCLUSION FROM
PARCEL "B"

Beginning at a point on the center line of S.W. Market Street at its intersection with the center line of S.W. First Avenue; [continued metes and bounds description of property]

APPENDIX "B"

RELATED AREAS - TRANSFER FROM PORTLAND GENERAL ELECTRIC TO PACIFIC POWER & LIGHT COMPANY

PARCEL "A"

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highway [continued metes and bounds description of property]

PARCEL "B"

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highway no. [continued metes and bounds description of property]

APPENDIX K

APPENDIX K

Order #73-688

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3001

In the matter of the filing of Revised Tariff Schedules applicable to electric service in the State of Oregon by PORTLAND GENERAL ELECTRIC COMPANY.	))))))	ORDER [Excerpt]

. . .

The company's present service area is a 3,371 square mile area within a state-approved service area allocation of 4,339 square miles, including 54 incorporated cities of which Portland and Salem are the largest.

. . .

Made, entered and effective October 25, 1973.

/s/ RICHARD W. SABIN
PUBLIC UTILITY COMMISSIONER

APPENDIX L

APPENDIX L

Order #74-658

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3074

In the matter of the suspension of revised tariff schedules applicable to electric service in the State of Oregon by PACIFIC POWER & LIGHT COMPANY (On the Commissioner's own motion).	ORDER [Excerpt]

. . .

For Oregon ratemaking purposes, Pacific's service area is divided into Area S (Springfield), D (The Dalles), P (Portland), and A (all other). The rates for service are the same for all points located in each area. Areas S and D rates are special competitive rates, lower than rates in the other areas, and designed to match the rates of the non-private and non-regulated electric utilities serving that same area. The rates for service in Area P are generally lower than for similar service in Area A.

It must be noted that the Commissioner has previously only allowed lower, competitive rates to be charged by Pacific in Areas S and D, provided that the difference between the lower competitive rates and the Area A rates be borne solely by Pacific's shareholders and not by Pacific's customers. Although no increase was proposed, for the competitive areas, the proposed rates result in an increase in the "competitive area adjustment" in the amount of $1,185,000 based upon the difference between the existing competitive area rates and the proposed Area A rates.

The lower Area P rates have been allowed for some time in the Portland area so that the electric rates would be on parity with those of Portland General Electric compared with PP&L. PGE also serves the Portland area - both companies being regulated and both companies being franchised to serve the City of Portland. Historically, the two companies competed for customers in this area.

. . .

C. Area A and Area P Rates

The rates in Area P (Portland) are generally lower than in Area A. A rate differential between Area P and Area A was formerly justified on the basis of competing electric service in Area P between Pacific and Portland General Electric. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.

The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

. . .

Made, entered and effective September 3, 1974.

/s/_____
RICHARD W. SABIN
PUBLIC UTILITY COMMISSION

APPENDIX M

APPENDIX M

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON
UA 37
UA 41

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for a Declaratory Order, an Order Allocating Exclusively Served Territory, and an Order Approving a Contract Allocating Utility Service Territory. (UA 37)

and

In the Matter of the Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an Order Approving a Contract Allocating Utility Service Territory and an Order Approving the Transfer of Rights Acquired by Allocation of Territory. (UA 41)

ORDER
No. 92-557

[Entered
April 16, 1992]

DISPOSITION: TERRITORIAL ALLOCATION CONFIRMED

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PROCEDURAL HISTORY

On July 2, 1990, PGE filed a three-part application with the Commission relating to territorial allocation of electric service in the City of Portland. In part one, PGE asks the Commission to issue a declaratory order affirming that Commission Order No. 72-870, issued in docket No. UF 2947 on December 15, 1972, allocated exclusive territory to PGE in the city. In part two, PGE asks the Commission to issue an order approving a 1972 agreement between PGE and PP&L allocating certain territory in the city to PGE. In part three, PGE asks the Commission to now allocate certain territory in Portland to PGE on the basis of years of continuous service to that area, pursuant to ORS 758.435. PGE also requests that the Commission treat each of its applications separately and independently. That three-part application was assigned docket number UA 37.

On October 2, 1991, PGE and PP&L jointly filed two applications relating to territorial allocation of electric service in the City of Portland. In one application, they ask the Commission to issue an order approving a 1991 contract allocating electric service territory and customers in and around the City of Portland. In the other application, they ask the Commission to issue an order approving the transfer of the right to provide electric service to Columbia Steel from PGE to PP&L. Those two applications were assigned docket number UA 41.

These cases present several issues relating to the allocation of service territory among those who provide electric utility service to the public in Oregon. These two dockets are consolidated pursuant to OAR 860-14-025; the issues overlap and considering them together is the most efficient and logical approach.

Columbia Steel, the Oregon Committee for Equitable Utility Rates (OCEUR), the Oregon Committee for Fair Utility

Rates (OCEUR), Elf Atochem North America, Inc. (Atochem), and the Columbia River People's Utility District filed petitions to intervene as parties in UA 37. They have been granted party status. The Oregon Rural Electric Cooperative Association filed a petition to intervene as an interested person in UA 37, and Atochem filed a petition to intervene as a party in UA 41. Those petitions were granted. The names and addresses of the parties and those who appeared in their behalf are listed on Appendix C to this order.

Atochem raised a new issue in its petition to intervene in UA 37. Its "proposed answer, protest, and counterapplication" discussed Commission Order No. 82-334, in which the Commission approved the sale to the Bonneville Power Administration (BPA) of PGE's substation and transmission facility serving the Atochem plant in Portland. Atochem asserted that the order removed the Atochem plant site from any effect of Order No. 72-870. It further asserted that the conduct of PGE, BPA and Atochem since 1982 has been consistent with the position that Atochem was not a part of PGE's service territory.

Numerous pleadings were filed and rulings issued between June 21, 1990, and February 14, 1992. Lowell Bergen, a Hearings Officer for the Commission, presided over procedural conferences on August 8, 1990 and December 19, 1991. The parties engaged in extensive settlement negotiations, and settled several disputed issues.

At the December 19, 1991 prehearing conference, the parties and Hearings Officer agreed that the parties' positions and arguments had been adequately presented in the filed pleadings and that an evidentiary hearing would not be necessary or helpful on any issue except as to the effects of Order No. 82-334. It may be necessary to hold an evidentiary hearing on the effects of that order. There is, however, no reason to delay a decision on the rest of the issues in UA 37 and UA 41 pending an evidentiary hearing on the 1982

transactions. Pursuant to ORS 756.528, the Commission will segregate the issues surrounding the 1982 order, pending a possible evidentiary hearing. The Commission will resolve the rest of the issues in these dockets in this order.

BACKGROUND

PGE and PP&L have provided electric utility service to Oregonians for many years. Their service in the Portland area is at issue in this proceeding. The central dispute is whether PGE and PP&L have been granted, or should be granted, exclusive territorial allocations in Portland. The applications ask the Commission to state the effect of a previous Commission order and to allocate territory prospectively.

In 1961, PGE and PP&L served overlapping and scattered territories in Portland. Where two or more electric utilities serve the same area, each must build substations, install transformers, and string lines to customers. The result is an inefficient and unsightly duplication of facilities. In some areas of Portland, for instance, utility poles bore eight or nine power lines, several from each company. The density of those lines also created a safety hazard for utility employees who had to repair them.

The 1961 Legislative Assembly addressed these problems by adopting SB 487, now codified in ORS 758.400 to 758.475. ORS 758.405 states the purpose of the statutory scheme:

> The elimination and future prevention of duplication of utility facilities is a matter of state-wide concern: and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services

The statutes create a regulatory framework for the allocation of territories to utility service providers. They establish two ways in which the Commission may approve exclusive service territory allocations. ORS 758.410 to 758.425 establish the first method: a utility and its neighboring utility may agree to a mutual service territory boundary and execute a contract allocating territories and customers between them. That contract must be filed with the Commission. If, after notice and hearing, the Commission determines that the contract will eliminate or avoid unnecessary duplicating facilities, it may approve the contract. ORS 758.435 to 758.440 establish the second method: if a utility is the exclusive provider of utility service in an area, the utility may unilaterally file an application with the Commission to obtain exclusive service territory. The Commission may approve that application after notice and a hearing. ORS 758.450 prohibits others from offering to provide or providing utility service in an allocated territory. The statute also prohibits other providers from offering or providing service in an area for which another provider has filed an application for an exclusive territorial allocation.

After SB 487 was passed, PGE and PP&L began the process of disentangling their duplicative facilities in Portland, In 1962, PGE filed an application to define its service territory throughout Oregon, including its territory in Portland. The Portland City Council passed a resolution opposing the application. PGE amended its application to exclude an allocation in Portland and the City Council withdrew its objection to the application. On January 21, 1963 the Commission issued Order No. 39026 in docket No. UF 2342 that did not allocate territory in Portland.

PGE and PP&L continued to negotiate about how to eliminate duplication of facilities in Portland. In 1965, as downtown Portland was developing, the City Council saw the desirability of installing underground electric utility facilities. The Council, in Ordinance Nos. 120617 and 120662, found that the conversion to underground electric service would be

facilitated if the electric utilities arranged their facilities within designated areas which each utility would serve exclusively. Such exclusive service, the Council found, would provide economies to the companies and would be in the public interest. The utilities drafted an agreement providing for the exchange of distribution facilities in 1966, and the Commission approved the agreement in Order No. 42751. Both the agreement and the order mention that the facilities exchange will, in accord with the ordinance, result in exclusive service areas for each utility. The order characterizes the application for approval of the agreement as being brought under ORS Chapter 757.

In 1972, PGE and PP&L concluded their negotiations with respect to separation of facilities in northeast Portland. They had also negotiated a transfer to PGE of PP&L's allocated territory in the Rainier service district in Columbia County and a transfer to PP&L of PGE's allocated service territory in the City of Maywood. The utilities submitted their plan to the City Council, noting in their cover letter that implementing the agreement would result in a "total separation of all electric utility facilities in the city."

The City Council approved the utilities' plan in Ordinance No. 134416. According to the ordinance, the purpose of the plan was to reduce the visual impact of duplicate facilities, to promote safety, economy, and subsequent undergrounding, and to work toward the lowest possible rates for consumers. The ordinance does not mention exclusive service territories. The utilities entered into an agreement for the exchange of facilities and the transfer of customer accounts on July 18, 1972.

By Order No. 72-870, the Commission approved the agreement. The order notes that the Rainier service district area was an exclusively served area previously allocated to PP&L by Commission Order No. 38498 (October 16, 1962). Order No. 72-870 transfers that exclusive allocation from PP&L to PGE. Neither the utilities' agreement nor the Commission's order mentions exclusive service territories for the Portland exchange.

In 1977 PGE and PP&L entered into an agreement permitting PGE to serve street-lighting fixtures in PP&L's service territory. This was the last transaction in the utilities' elimination of duplicate facilities in Portland.

Columbia Steel operates a manufacturing facility in Portland, an area in which PP&L transferred facilities and customers to PGE under the 1972 order. Since before 1972, Columbia Steel has purchased all of its electricity from PGE under an agreement that is automatically renewed each year unless one party provides the other with timely written notice of termination.

In 1989, Columbia Steel and PP&L entered into negotiations to permit Columbia Steel to purchase its electric power from PP&L rather than PGE. PP&L owns a transmission line that crosses Columbia Steel's plant site. In April, 1990, PP&L notified Columbia Steel that it would offer it a power contract. PGE then notified Columbia Steel that PP&L could not lawfully furnish electricity to Columbia Steel, because Columbia Steel was within PGE's exclusive service territory and service to Columbia Steel by PP&L would constitute a breach of the 1972 agreement between the utilities.

PP&L and Columbia Steel each filed actions in Federal District Court asking for a judicial declaration of the rights and obligations of PP&L, PGE and Columbia Steel under the 1972 agreement and order, among other things. The cases were consolidated in Case No. 90-592. PGE then filed its applications in UA 37, asking the Commission to interpret the 1972 order as a territorial allocation, to now approve the 1972 agreement between the utilities, and to allocate to PGE the territory at issue in the 1972 order on grounds of its past exclusive service to that territory.

On July 3, 1991 the District Court judge ruled on Columbia Steel's and PGE's cross motions for summary judgment. The court ruled against PGE and granted Columbia's motion in

part. Columbia alleged, among other things, that 1972 agreement and order did not constitute a territorial allocation and that the doctrine of state action does not immunize PGE from federal antitrust liability under the Sherman Act. The court ruled that Columbia is entitled to a declaration that Order No. 72-870 did not approve a territorial allocation and neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia. It is also held that the 1972 agreement and order did not immunize PGE from antitrust liability under the doctrine of state action.

This order will address the issues raised by the parties, starting with challenges to the Commission's jurisdiction.

UA 37

Commission Jurisdiction.

Columbia Steel mounts three challenges to Commission jurisdiction. First, it challenges the Commission's authority to issue a declaratory ruling on the meaning and effect of Order NO 72-870. Second, it asserts that the Commission has no authority to allocate territory within the City of Portland. Third, it maintains that the District Court ruling deprives the Commission of authority to interpret the 1972 order and agreement as a territorial allocation.

> **Declaratory Ruling.** ORS 756.450 provides, in relevant part:
>
> On petition of any interested person, the commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission.

Columbia maintains that because Order No. 72-870 is not a rule or statute, it may not be the subject of a declaratory ruling.

The documents creating this proceeding and the various judicial proceedings were filed because of controversies surrounding the meaning of Order No. 72-870. The Commission cannot resolve the controversies raised in this proceeding without determining the meaning of Order No. 72-870. More importantly, the Commission must regulate utility service for the benefit of the public. Part of that obligation concerns the allocation of service territories. That obligation includes determining which utilities should provide service to the various portions of the state's largest metropolitan area.

Whether the Commission's authority to decide the meaning of Order No. 72-870 arises from the declaratory ruling statute or the statutes, such as ORS 756.515, authorizing the Commission to investigate any matter relating to utilities and to regulate utilities [illegible] settle relevant disputes presented to it is unimportant. The parties, including Columbia Steel, have raised issues concerning that order. Those issues must be resolved.

Authority Within Cities. Columbia Steel has challenged the Commission's jurisdiction to grant exclusive franchises within Portland. ORS 758.470(1) provides that the allocation statutes "shall not be construed or applied to restrict the powers granted to cities to issue franchises." The Portland city charter provides that "[n]o exclusive franchise shall be granted." Portland City Charter Sec. 10-206. While the term "exclusive franchise" is not defined in the charter, it is commonly understood to mean the right to do business without competition. None of the parties challenges that definition[1]. A territorial allocation to a utility would constitute an exclusive franchise.

---

[1] In its reply to Columbia Steel's motion to dismiss, PGE challenges what it characterizes as Columbia Steel's definition of "franchise" as denoting the right to do business without competition. Columbia Steel was not discussing the meaning of "franchise" but of "exclusive franchise."

Columbia Steel argues that the Portland city charter prohibition of exclusive franchises, together with the statutory reservation of powers, precludes the Commission form allocating exclusive service territories within the city, regardless of any statewide policy to eliminate duplicative facilities. Such an allocation, Columbia Steel contends, would foreclose the city's right to choose which utilities will serve it and under what conditions they will serve.

The City of Portland did not intervene in this proceeding.

To read the statute to prohibit the Commission from granting exclusive territorial allocations within cities would frustrate the clear intention of the statute to eliminate duplicating facilities statewide. A large portion of utility service is delivered to customers in cities. If cities were excluded from the commission's allocation authority, the Commission would have only a minor role in implementing the statutory framework. There would not be a central authority overseeing the elimination of duplicate utility facilities within the state.

Moreover, the legislative history of the statutes demonstrates the legislature's intent to provide for territorial allocation within cities. When SB 487, which became the territorial allocation statutes, was under consideration, the League of Oregon Cities proposed an amendment to exempt all territory within the limits of an incorporated city from the allocation scheme. The proposed amendment stated:

> Nothing in this act shall apply to territory or utility service or facilities within the limits of incorporated cities as they now exist or hereafter extended.

Proposed amendment, House Planning and Development Committee, April 11, 1961. The amendment was rejected.

The territorial allocation statutes and the statute protecting franchise rights have been applied in harmony through the

years. Cities exercise their franchise right when they grant or deny individual utilities the right to provide service within their city boundaries. The commission grants or denies applications for exclusive territorial allocations. A utility company needs authority from a city to provide service in the city and needs approval from the Commission to operate exclusively in a territory. That practice accommodates the cities' right to control who provides utility service within their boundaries and the Commission's authority to grant exclusive territorial allocations to implement the statewide policy of eliminating duplication. The provisions in ORS Chapter 758 that authorize the Commission to allocate exclusive service territories and reserve the franchise rights to cities do not conflict.

Even if a city charter and the Commission's authority to allocate service territories did conflict, the Commission's authority, vested in it by the legislature, is paramount over that of a city. The legislature governs matters of statewide concern; local governments have control over matters of purely local concern. *State ex rel. Heinig v. Milwaukie*, 231 Or 473, 479, 373 P2d 680 (1962). The state policy to eliminate duplicative facilities takes precedence over any city policy to the contrary. That is consistent with the broad powers vested in the Commission by ORS 756.040(2):

> The commission is vested with power and jurisdiction to supervise every public utility, railroad, air carrier and motor carrier in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

Notwithstanding its city charter, the City of Portland has in the past behaved as though the state scheme was paramount and issued ordinances granting exclusive franchises to electric utilities within its boundaries. *See* Ordinance Nos. 120617 and 120662 (1965) granting exclusive franchises to PGE and PP&L for electric service provided through underground facilities in the downtown area of the city.

Columbia Steel's objection to PGE's second and third applications on the ground that the Commission is not authorized to approve a territorial allocation within the City of Portland is rejected. The Commission concludes that it has authority to approve territorial allocations within cities.

District Court Ruling. Columbia Steel argues that the District Court ruling has deprived the Commission of authority to interpret its 1972 order and the agreement it approved. It bases its contention on its understanding that federal antitrust laws now apply to the agreements and order. The scope of the District Court ruling, however, is much narrower than Columbia Steel contends. In a ruling in the antitrust proceeding before it, the court ruled that Columbia Steel is "entitled to a declaration [from the court] that Order No. 72-870 of the PUC neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia." The court did not find PGE guilty of an antitrust violation; that question is still pending. Its ruling merely may foreclose one avenue of defense against an antitrust claim. The court's ruling was not intended to, nor did it deprive the Commission of jurisdiction over the issues in this docket.

The 1972 Agreement, Application and Order

Order No. 72-870

Both dockets before us were opened as a result of the uncertainly of the parties about the effect of Order No. 72-870. Before we address the individual applications in these dockets, we will discuss the 1972 order and the documents underlying it to assess its impact on the issues we are to resolve.

The agreement the order approves is dated July 18, 1972, and states that the parties want to eliminate the duplication of electric facilities in the Portland and Rainier areas. It provides for the exchange and transfer of facilities and customer accounts

between PGE and PP&L. The facilities include distribution plant, transmission equipment and real property The agreement provides for the orderly transfer of property and customer accounts, and requires each company to transfer all rights each has in the facilities and account to be transferred (except that PP&L's franchise to operate in Portland is not to be assigned). The agreement states that it is subject to the approval of the Public Utility Commissioner and any other regulatory agency having jurisdiction over the transactions.

As indicated, Pacific agreed to transfer its facilities and customer accounts in parcel C to PGE and PGE agreed to transfer its facilities and customer account in parcels A and B (with certain exceptions) to PP&L. The parties agreed that PP&L would keep its facilities and customer accounts in parcel D. PP&L agreed to transfer its service center, land, and customer accounts in Rainier to PGE. PP&L's Rainier District employees were given the option to become PGE employees.

Appendix A to this order contains legal descriptions of the parcels. Appendix D, page one, is a map of the Portland area showing the four parcels. Appendix D, page two, shows parcels B and D in greater detail.

The agreement refers to the City of Portland Ordinance number 134416, passed on April 26, 1972, which consents to the PGE/PP&L exchange of properties in Portland and Rainier. The ordinance notes that PGE and PP&L hold nonexclusive franchises within the City of Portland and specifies that the obligation to supply properties within the city must remain binding on both utilities. The ordinance makes no distinction between the exchanges in the two cities, calling them both exchanges of property.

On July 25, 1972, PGE and PP&L filed a joint application with the Commission for approval of the proposed exchanges. The caption states that it is an application for approval for the two companies to exchange facilities in Multnomah and

Columbia Counties and to assign to PGE the service territory previously allocated to PP&L in Columbia County. The introductory paragraph says the applicants apply for a Commission order under ORS Chapter 757 authorizing the two companies to exchange facilities in Multnomah and Columbia Counties. Section 1 of the application is entitled DISPOSITION OF FACILITIES and describes the requested exchange between the two companies in Multnomah County. Section II, entitled ASSIGNMENT OF SERVICE TERRITORY, says the application "is further for an order of the Commissioner, pursuant to the provisions of ORS 758.460, approving the assignment to Portland General of all rights acquired by Pacific in and to certain service territory allocated to Pacific as its exclusive service territory by the Commissioner's Order No. 38498 dated October 16, 1962, Docket No. 2332." A description and map show that section II of the application applies to territory in the City of Rainier.

In the statutory scheme for territorial allocation, ORS 758.410 governs allocation by contract between two utilities. That statute provides:

> (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could be economically served by the then existing facilities of either party, or by reasonable and economic extensions thereto.
>
> (2) Any such contracting parties may also contract in writing for the sale, exchange, transfer, or lease of

> equipment or facilities located within territory which is the subject of the allocation agreed upon pursuant to subsection (1) of this section. Any sale, exchange, transfer or lease of equipment, plant or facilities made pursuant to this subsection by any person which is a "public utility" as defined in ORS 757.005 is also subject to the approval of the commission to the extent required by ORS chapter 757.

ORS 758.420 requires the Commission's approval of a contract between utilities for allocation of service territory.

PGE argues that by the 1972 agreement, application, and order, PGE, PP&L and the Commission intended to and did allocate territory as authorized by ORS 758.410.

Columbia Steel takes the position that the 1972 agreement did not allocate territory but only authorized an exchange of facilities, equipment, and customers. ORS 758.420 authorizes the Commission to approve an agreement "as filed". Therefore, Columbia Steel contends, a Commission order approving a territorial allocation based on the 1972 agreement between PGE and PP&L would have no legal effect. Furthermore, Columbia Steel contends that the Commission cannot now approve the 1972 agreement because ORS 758.420(1) requires the contract to be "promptly" filed with the Commission. While it was promptly filed for the 1972 proceeding, it would not be promptly filed for a proceeding almost 20 years later.

Discussion. The 1972 order characterizes the Portland portion of the application as an application to exchange property under ORS 757.480. That statute provides for Commission approval of the sale, lease, assignment or other disposition of public utility property.

The order and other documents use very different language to describe the facilities exchange in Portland and the territory

assignment in Rainier. The two transactions are different, and that can help explain the difference in language. Rainier had already been allocated to PP&L by Commission Order No. 38498, and was therefore already an exclusively served area. The northeast Portland territory had been served by both utilities and had not yet been allocated to either one. The application and the order both make obvious distinctions between the exchange of facilities under ORS Chapter 757 and the assignment of an allocated service territory under ORS Chapter 758. In describing the transactions, the order states that PGE and PP&L are exchanging facilities and customers in Multnomah County, and are transferring facilities and service territories in Rainier. The concluding paragraph before the ordering paragraphs continues to distinguish the two transactions:

> From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for.

Order No. 72-870 at 8. In the ordering paragraphs, the Commissioner approves the application to transfer exclusively allocated service territory in Rainier from PP&L to PGE, and allows PGE and PP&L to transfer facilities within Multnomah County.

Failure to mention an appropriate statute need not determine the order's effect, however. In 1966, Commission Order No. 42751 approved exclusive service territories for PGE and PP&L in downtown Portland. According to that order, the underlying application there was also for an exchange of facilities under ORS Chapter 757. However, the 1966 order did

explicitly acknowledge that the facilities exchange would result in exclusive service territories, even though it did not refer to the contractual allocation statute.

ORS 758.415 authorizes approval of an agreement for the allocation of territory if the Commission finds:

> that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby.

ORS 758.415 itself does not expressly provide that exclusive service territories will be created upon Commission approval of a contract between affected utilities which divides up and separates service territories. However, the section is a part of ORS 758.400 to 758.475 and the legislative purpose of those sections is to create exclusive service territories. Once the findings required by ORS 758.415 are made, the contract must be approved and, without more, exclusive service territories are created by operation of law.

Significantly, the 1972 order recites findings required by ORS 758.415 relating to the elimination of duplicating facilities and the economic and safe use of utility facilities. The order does not expressly find that adequate and reasonable service to the affected territories and customers will be provided, but that finding easily is implied from the order's language. Moreover, the 1972 agreement and order provide for an exchange of customers as well as an exchange of facilities and equipment. ORS Chapter 757 deals only with exchange of facilities; only ORS 758.410 addresses the exchange of customers.

A subsequent Commission administration apparently entertained doubts about the effect of Order No. 72-870,

because in 1976 two memorandums issued by Commission Counsel to the Deputy Commissioner on the topic of PGE-PP&L switchover customers.[2] The first memo, dated March 4, 1976, discusses the effect of ORS 758.435(3), the exclusive service allocation exception, and concludes that utilities in the situation described in that subsection are limited to allocation by contract, under ORS 758.410.

The second memo, dated April 6, 1976, addresses whether Order No. 72-870 is a binding territorial allocation. The memo asserts that because the order recites the requisite findings under ORS 758.415 and deals with the exchange of customers as well as of facilities and equipment, the Commissioner was entertaining the application for approval of the agreement under ORS 758.410 to 758.420

The memo concludes by advising the Deputy Commissioner that the Commission:

> should take the position that Order No. 72-870 was a territorial allocation within Portland, enforceable by the commissioner, PP&L or PGE against encroachment.

At least from that time forward, the Commission did take the recommended position, as shown by the rate cases cited above.

PGE's belief that the 1972 order allocated territory is not unreasonable. As a practical matter, the exchange of equipment, facilities, and customers approved in Order No. 72-870 created service territories for each of the utilities. A service territory is the obvious result of such a division of facilities and customers, and the creation of such territories is the outcome of the utilities' program to disentangle their duplicative equipment.

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[2] The Commission takes official notice of these memos pursuant to OAR 860-14-050

There is much extrinsic evidence that the Commission and the parties intended a territorial allocation. The record shows that not only the utilities but also the Commission behaved as though the order had allocated territory.

The earliest evidence of the utilities' understanding of the effect of their agreement is a resolution by the Board of Directors of PP&L dated July 26, 1972, but adopted at a meeting held on December 16, 1971. The resolution authorizes the officers of PP&L to enter into a contract with PGE that will provide for the

> transfer to that company of electric transmission and distribution facilities belonging to [PP&L]... *and the allocation of such area to [PGE]*, and the acquisition by [PP&L] of certain electric transmission and distribution facilities belonging to [PGE]... the transfer of facilities and *allocation of area* pursuant to such contract to be subject to the approval of the Public Utility Commissioner of Oregon, the City of Portland and the Federal Power Commission to the extent required by law...(Emphasis supplied.)

A letter from representatives of both utilities to the Public Utility Commissioner dated February 10, 1972, states:

> Our study has resulted in a mutually agreed upon plan whereby each company would *serve specified areas* within the City of Portland. . . . The plan, when put into effect, will immediately discontinue any addition of duplicating electrical facilities and will make possible the removal of existing duplicated facilities in conjunction with future scheduled construction. (Emphasis supplied.)

Both utilities were under the impression that some form of territorial allocation would result from the Commission order.

From 1972 until 1990, furthermore, the parties have behaved as though the 1972 order allocated territory to them. In 1977, PGE and PP&L entered into a street lighting agreement under which PGE was to serve street-lighting fixtures in PP&L's service territory. That agreement was the final separation of equipment and facilities in the program to eliminate duplicative facilities. The agreement recites that both utilities serve metropolitan Portland and have, with regulatory approval, completed transfer of facilities to eliminate duplication within metropolitan Portland. It continues:

> WHEREAS, such agreements provide that [PGE] will provide certain electric service *within the service territory assigned to [PP&L] in the Portland metropolitan area*...(Emphasis supplied.)

If the utilities had not believed that approval of the 1972 contract and the transfer of facilities and equipment created allocated territories, they would not have had to agree that PGE could service street lights within "the service territory assigned to [PP&L]."

As a last example of the utilities' behavior after the 1972 order, PGE and PP&L in their joint application for an allocation in this proceeding state that:

> Since the 1972 Agreement and Order, [PP&L] has not provided service within the geographic areas in Portland where distribution facilities were conveyed to PGE and PGE has not provided service within the geographic areas in Portland where distribution facilities were conveyed to [PP&L].

The Commission also acted as though the utilities had received territorial allocations in Portland. On October 25, 1973, in UF 3001, Order No. 73-688, at 3, the Commission stated:

> [PGE's] present service area is a 3,371 square mile area within a *state-approved service area allocation* of 4,339 square miles, including 54 incorporated cities of which Portland and Salem are the largest. (Emphasis supplied. *See also* Order No. 75-832 at 3 issued in September 1975 and Order No. 79-055 at 3 issued in January 1979.)

In UF 3074, Order No. 74-658 at 2, it wrote:

> In Oregon, [PP&L's] *electric service areas* are scattered over a large part of the state. The company *serves in ...parts of Portland....*(Emphasis supplied. *See also* Order No. 75-704 at 4: Order No. 82-606 at 5; Order No. 83-669 at 3.)

Finally, also in Order No. 74-658 cited above, the Commission rejected PP&L's filing for a tariff applicable only to its Portland customers. Historically, the Commission had allowed PP&L to charge lower rates in Portland so that its rates would be in parity with PGE's. In this rate case it did not allow the tariff, because it found that PP&L was no longer subject to competition in Portland.

> The two companies no longer competitively serve the same area. Their respective *areas of service* within Portland have been defined. Thus, with the lack of competition, the justification for the rate uniformity [with PGE] is said to have disappeared.

Order No. 74-658 at 25, *reh'g or reconsideration denied*, Order No. 74-935, *aff'd sub nom, American Can Co. v. Davis*, 28 Or App 207, 225, 559 P2d 898 (1976) (emphasis supplied).

To summarize, because Order No. 72-870 did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statues and because the order did not say that exclusive territorial allocations are being created in

Portland, Order No. 72-870, perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.

For the foregoing reasons, it appears to the Commission that Order No. 72-870 is not a complete and accurate memorial of the 1972 decision of the Commissioner in docket No. UF 2947: the order omits a reference to the statute under which its findings were actually made when the Commissioner approved the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend Order No. 72-870, nunc pro tunc, to conform to the actual decision intended and followed. The details of the amendment are shown in the ordering paragraphs in this order.

Exclusive Territorial Allocation

PGE requests that the Commission grant it a territorial allocation based on exclusive service to an area under ORS 758.435.

ORS 758.435 provides, in relevant part:

> (1) Any person providing a utility service in a territory that is not served by another person providing a similar utility service may make application to the commission for an order allocating such territory to it....
>
> (2) The commission shall within 30 days after the filing of such application give notice of the filing. If

> the commission chooses, or if a customer requests a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of the hearing within 30 days of the request which notice shall set the date and place of hearing. The hearing shall be held at a place within or conveniently accessible to the territory covered by the application. Notice of the filing shall be by publication in a newspaper or newspapers for general circulation in the territory covered by the application and shall be published at least once weekly for two successive weeks. Written notice of the filing shall be given to providers of similar utility service in adjacent territory.
>
> (3) Territory within the limits of a city, as fixed on May 31, 1961, shall not be deemed to be served exclusively by any person, if such city is, on such date, served by more than one person having necessary municipal or franchise authority to serve within the entire city.

Columbia Steel argues that, because PGE and PP&L both had authority to serve the entire City of Portland as of May 31, 1961,[3] neither can be deemed to be serving territory

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[3] PGE takes issue with this assertion of Columbia's. It contends that Columbia Steel has not met its burden of showing that "more than one person [had] necessary municipal or franchise authority to serve within the entire city" on May 31, 1961. The parties agreed that the Commission would make a decision based on the record submitted to the Hearings Officer and anything of which he could take official notice. Based on a preponderance of the evidence in the record, the Commission concludes that both utilities were franchised to serve the entire city on the date in question. *See, e.g.*, Brief of City of Portland in Commission docket No. UF 2342 (1962) opposing PGE's application for exclusive service territory within the City of Portland. Exhibit H to Columbia Steel's motion to dismiss, at 6-7; Section 1 of City of Portland Ordinance No. 134416 consenting to the exchange of property within the city limits of Portland between PGE and PP&L (1972).

exclusively. ORS 758.435(3). It argues that "deemed" implies the whole decision making process whereby territory might be allocated under this statute. There is, therefore, no basis for a territorial allocation under ORS 758.435. Columbia's position is that no utility may ever obtain a territorial allocation within a city based on exclusive service if, on May 31, 1961, the city was served by more than one utility having authority to serve within the entire city.

PGE argues that ORS 758.435(3) applies only to the preliminary finding of exclusive provider status. PGE argues that subparagraph (3) merely requires utilities that serve in cities that have granted more than one franchise to make an affirmative showing that they are, in fact, exclusive providers. PGE urges the Commission to read subsection (3) in the context of the whole act and to construe it narrowly because it is an exception. A narrow construction would read "deemed" to indicate a preliminary finding, not a permanent ban on this form of allocation to affected utilities.

Commission staff joins PGE's position. It argues that ORS 758.435(3) does not bar a grant of territorial allocation based on exclusive service in cities that have franchised more than one utility. According to staff, the provision means that there can be no presumption that a utility which is, in fact, exclusively serving an area of the city is entitled to allocation of that territory based on ORS 758.435. If, however, no other utility within the city objects to allocating such territory under ORS 758.435 and the city itself does not object, the Commission can allocate territory to a utility as an exclusive provider. Both PGE and staff assume that ORS 758.435(2) describes the procedure by which an affected utility would gain a grant of territorial allocation as an exclusive service provider.

The Commission finds that ORS 758.435(3) bars a grant of territorial allocation under ORS 758.435 to utilities serving cities that were served on May 31, 1961, by more than one person with the authority to serve the entire city. Regardless of

which implication a reader gives to the word "deemed," the sense of its clause is clear: no utility in that situation meets the threshold requirement for allocation of territory on the basis of exclusive service. This reading is consistent with the assertions of all three parties. However, the Commission disagrees with staff and PGE when they go on to say that if a utility described in subsection (3) goes through the approval procedure in ORS 758.435(2), it overcomes that initial status and may be allocated territory as an exclusive service provider.

PGE correctly urges the Commission not to read a subsection in isolation. The structure of ORS 758.435 in its entirety gives an important indication as to the proper reading of its subsection (3). The first subsection describes a class of utilities, those serving in territories where there is no other service provider. The second subsection establishes a set of procedures utilities must pursue to receive a territorial allocation as exclusive service providers. The third subsection describes a second class of utilities, those serving in municipalities that have franchised more than one utility to serve throughout the city as of a certain date. The fact that subsection (3) follows the procedural subsection indicates that the procedures do not apply to the utilities it describes. The subsection is at the end of the statutory section because it functions to except its class of utilities from the possibility of territorial allocation as exclusive service providers. No procedures are provided by which the utilities it describes can be considered exclusive service providers, and the position of the subsection signals that the preceding subsection does not apply to it.

This reading is not, as PGE contends, at odds with the legislature's object and policy. Instead it permits utilities to divide territory by contract, under ORS 758.410, subject to Commission approval

The Commission concludes that PGE may not be granted its requested territorial allocation as an exclusive service provider under ORS 758.435.

Disposition of UA 37

The Commission declines to allocate exclusive territories in Portland to PGE and PP&L based on their providing exclusive service in the city. However, the Commission finds that the Commission intended to allocate exclusive service territories within Portland in 1972 in Order No. 72-870 in UF 2947. In this order the Commission is amending Order No. 72-870; therefore, PGE's request for a declaratory ruling on the 1972 order and its request for approval of its 1972 contract with PP&L are moot.

UA 41

On October 2, 1991, PGE an PP&L submitted an application pursuant to ORS 758.420 and OAR 860-25-101 for approval of a contract allocating utility service territory and customers in and around the City of Portland. The application also requests the transfer of PGE's rights to serve Columbia Steel. These matters were docketed as UA 41.

Pursuant to ORS 758.420, the Commission published notice of the contract on February 26, 1992. No customer requested a hearing within 30 days of the notice, and the Commission does not choose to schedule additional events.

The 1991 Allocation Agreement

The 1991 Allocation Agreement contractually allocates territories and customers in the City of Portland in the boundary areas set forth in the 1972 agreement. The parties note that they filed their application to resolve the uncertainty created by the District Court's order in Case No. 90-592 about whether the 1972 agreement and order created allocated service territories. The parties filed their application expressly without waiving the right to assert that allocated service territories were validly created in 1972.

The joint PGE/PP&L application is for approval of an agreement between them dated September 30, 1991. Under that contract, the utilities agree pursuant to ORS 758.410 that the area described as Parcels A, B, and D in the 1972 agreement and all customers within those parcels shall constitute territory allocated to PP&L. PP&L currently serves all customers located in those parcels. The utilities further agree that the area described as Parcel C in the 1972 agreement and all customers in that area shall constitute territory allocated to PGE. PGE currently serves all customers in that parcel. See Appendix A to this order for a description of the parcels and Appendix D for maps of the parcels.

No sale, exchange, transfer, or lease of equipment, plant, or facilities will be necessary under this application.

OAR 860-25-010(1) to (4) require applicants for approval of allocation agreements under ORS 758.410 to provide maps of their service areas and the location of their customers, metes and bounds descriptions of the boundaries of the territory to be served by each party, and descriptions of the equipment and facilities of each party to be sold, exchanged, transferred, or leased under the contract. OAR 860-25-010(5) provides that the application must also contain:

> Facts showing that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract while providing adequate and reasonable service to all territories and customers affected thereby.

PGE and PP&L each ask for allocation of areas that they have served since the facilities and customer exchange of 1972. An allocation of those territories would avoid unnecessary duplication of facilities and meet the efficiency, economy and safety concerns of the rule and statute. If the Commission

approves the application, the affected territories and customers would experience no change in service. That service is adequate and reasonable.

The only objection to the application is by Atochem. It does not want any allocation to adversely affect its claim that events in 1982 take it out of any allocated territory. That issue will be addressed in the segregated portion of this proceeding.

This order resolves the controversies surrounding the 1972 events by confirming the previous allocations. However, while the issues are resolved as far as the Commission is concerned, the matter is still being litigated in other forums. To resolve any future ambiguity about the status of territorial allocations in Portland, the commission will include in this order a decision on the merits of the joint PGE/PP&L 1991 application in UA 41. The requirements of ORS 758.410 and OAR 860-25-010 have been satisfied and the Commission approves PGE's and PP&L's 1991 contract for allocation of territories and customers in Portland,

Service to Columbia Steel

In UA 41, PGE and PP&L also apply for an order approving the transfer of rights acquired by allocation of territory. Specifically, they apply for transfer to PP&L of PGE's right to serve Columbia Steel, pursuant to ORS 758.460 and OAR 860-25-027. In October of 1989, Columbia Steel, a PGE customer, requested that PP&L provide it with electric service. That request led to litigation in the federal district court and to these applications to the Commission.

In an effort to resolve a major portion of the litigation, PGE and PP&L entered into a settlement agreement. The allocation agreement discussed above is part of the settlement, as is PGE's consent to transfer to PP&L the right to serve Columbia Steel. PGE has agreed to deliver power to PP&L from its Portsmouth Substation until October, 1993, at the

latest, while PP&L constructs the facilities needed to serve Columbia Steel form PP&L's transmission line near Columbia's site.

ORS 758.460 provides that a transfer of rights acquired by territorial allocation is subject to Commission approval and that approval is to be granted if the transfer is not contrary to the public interest. In this order, the Commission approves PGE and PP&L's application for territorial allocation within the City of Portland.

The Commission also concludes that the transfer of rights is not contrary to the public interest. This transfer is part of a larger settlement that resolves much of the dispute about the effect of Order No. 72-870. It thus falls within the public policy favoring the compromise and settlement of disputes. The transfer, as designed by the parties, will not cause any short-term disruption of service to Columbia Steel, and it will meet Columbia's long-term needs for electrical service. The transfer is not likely to have adverse effects on PGE's or PP&L's ability to serve their other customers.

The agreement covering the transfer of rights meets the criteria of OAR 860-25-027.

CONCLUSIONS

It is concluded that:

1. The application filed and docketed as UA 37 should be granted in part and Order No. 72-870 should be amended nunc pro tunc;

2. The application filed and docketed as UA 41 should be granted;

3. The rights to serve the electric needs of Columbia Steel should be transferred from PGE to PP&L;

4. The 1991 Allocation Agreement between PGE and PP&L should be approved and territories allocated accordingly.

ORDER

IT IS ORDERED that:

1. Order No. 72-870 is hereby corrected by striking the following paragraph from page eight:

> "From the foregoing, it is concluded that the application of Pacific Power & Light Company and Portland General Electric Company should be granted and an order entered approving the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approving the transfer and exchanging of utility property and facilities and customers between the two companies as applied for. It is therefore"

and substituting the following language:

> "From the foregoing, it is concluded that the applications of Pacific Power & Light Company and Portland General Electric Company should be granted, and an order entered as follows:

1. Under ORS 758.460, approving the transfer of certain exclusively served territory in the Rainier area for Pacific Power & Light Company to Portland General Electric Company.

2. Under ORS 758.425, approving the agreement of the companies, which separates service territories and transfers affected customers: and

3. Under ORS 757.480 approving the exchange of assets and facilities to implement these transactions. It is therefore"

2. The correction to Order No. 72-870 is hereby entered nunc pro tunc as of December 15, 1972, the date when the decision was originally made and entered;

3. The applications filed by PGE and PP&L on October 2, 1990, docketed as UA 41, are granted;

4. The 1991 Allocation Agreement between PGE and PP&L allocating territories and customers within the City of Portland is approved;

5. The exclusive territorial allocation to the areas described as Parcels A, B and D of Appendix A to this order is confirmed to PP&L;

6. The exclusive territorial allocation to the area described as Parcel C of Appendix A to this order is confirmed to PGE.

7. The rights to serve the electric needs of Columbia Steel within the areas described in Appendix B to this order are transferred form PGE to PP&L;

8. The impacts of Commission Order No. 82-334 will be decided in a future Commission order.

Made, entered and effective April 16, 1992.

/s/_____
Ron Eachus
Chairman

/s/_____
Myron B. Katz
Commissioner

/s/_____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order pursuant to ORS 756.580.

APPENDIX A

Territory allocated to PP&L:

Parcel A:

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highways [continued metes and bounds description of parcel].

Parcel B:

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highways [continued metes and bounds description of parcel].

Parcel D:

Beginning at a point on the centerline of S.W. Market Street at its intersection with the centerline of S.W. First Avenue [continued metes and bounds description of parcel].

Territory allocated to PGE

Parcel C:

Beginning at a point on the Oregon-Washington State line and an extension of the East side of Sundial Ranch Road [continued metes and bounds description of parcel].

APPENDIX B

Meets and Bounds Description of Columbia Steel Casting Co. plant site and adjacent property

Parcel 1: [Omitted].

APPENDIX C

[omitted]

92-557

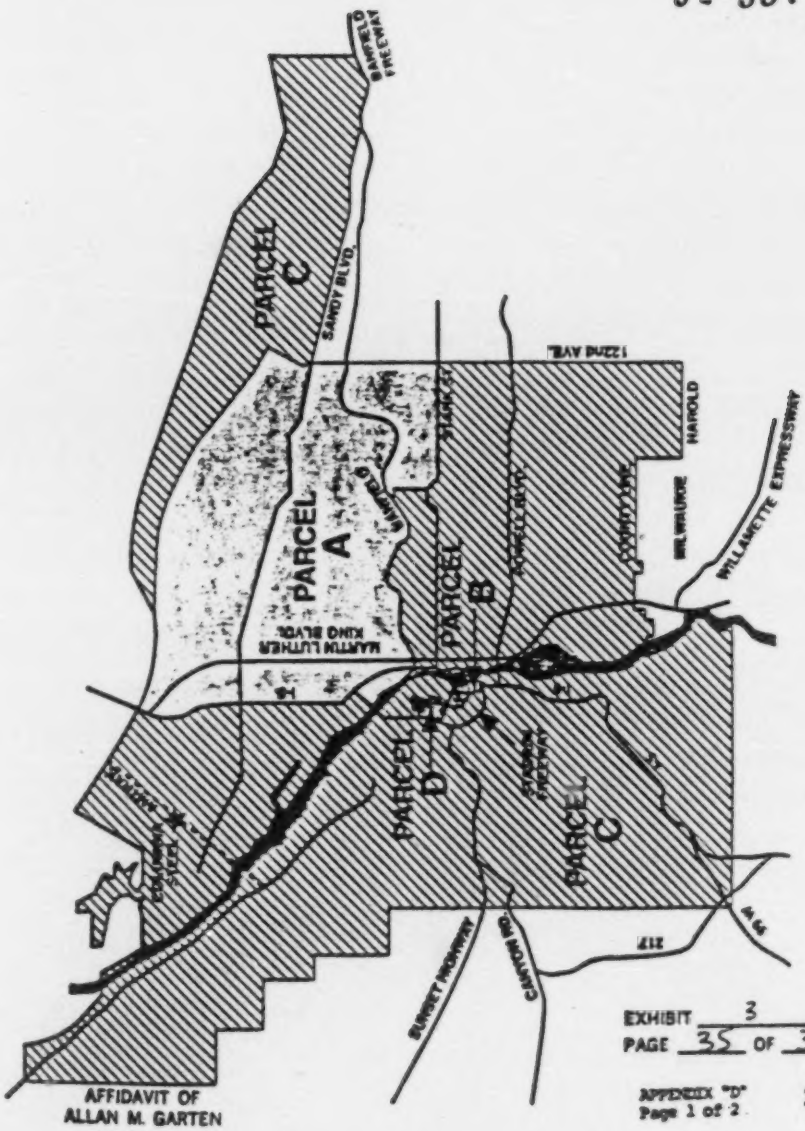

EXHIBIT 3
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APPENDIX N

APPENDIX N

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UA 37
UA 41

In the Matter of the Application of Portland General Electric Company for a Declaratory Order, an Order Allocating Exclusively Served Territory, and an Order Approving a Contract Allocating utility Service Territory. (UA 37)

and

In the Matter of the Application of PACIFIC POWER & LIGHT COMPANY and PORTLAND GENERAL ELECTRIC COMPANY for an Order Approving a Contract Allocating Utility Service Territory and an Order Approving the Transfer of Rights Acquired by Allocation of Territory. (UA 41)

O R D E R
No. 92-1135

[Entered August 7, 1992]

DISPOSITION: PETITION FOR RECONSIDERATION DENIED

On April 16, 1992, the Commission issued Order No. 92-557, resolving the issues raised in docket Nos. UA 37 and UA 41[1]. On June 15, 1992, Columbia Steel Casting Co., Inc. filed a petition for reconsideration of the order. On June 30, 1992, Portland General Electric Company (PGE) filed a response to the petition.

Columbia Steel lists two principal reasons why it wants the Commission to reconsider Order No. 92-557. The first is that the Commission lacks authority to either amend or interpret Order No. 72-870. The second is that, in spite of its repeated requests and over its objections, Columbia Steel was denied the opportunity for a hearing.

Commission Authority as to Order No. 72-870.

In Order No. 92-557, the Commission found that Order No. 72-870 was not a complete and accurate memorial of the Commissioner's decisions in docket No. UF 2947, and amended a paragraph to accurately reflect the decisions made in 1972. Columbia Steel argues that the Commission lacks authority, as a matter of law, to amend Order No. 72-870 *nunc pro tunc*. Columbia Steel argues that a *nunc pro tunc* order can only correct clerical errors, not errors made in rendering the decision. Columbia Steel also argues that the Commission has no authority to interpret one of its orders.

The correction to Order No. 72-870 supplied missing statutory citations to clarify the decisions made. The correction does not give retroactive effect to Order No. 92-557, but conforms Order No. 72-870 to the actual decisions made and followed. It is within the Commission's authority to enhance stability in the utility industry by explaining and clarifying its previous decisions. While the wording of Order No. 72-870

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[1] One issue was reserved for later determination, but is not relevant to the issues discussed in this order.

might have been clearer in some respects, there was no doubt as to its substance.

ORS 756.040 authorizes the Commission to regulate and supervise utility companies and to do all things necessary or convenient in exercising its authority. ORS 756.515 authorizes the Commission to investigate, on its own motion, any matter relating to a utility company. As a practical matter, the Commission must construe, consider, and enforce its own orders. The Commission rejects the notion that it is impotent to interpret, amend, or otherwise revisit its previous orders.

Opportunity for a Hearing.

Columbia Steel contends that it "has repeatedly requested a hearing in this proceeding, but no hearing was granted." Columbia Steel does not support its contention by any references to documents or other parts of the file of this proceeding that might contain such repeated requests. Columbia Steel entered this proceeding by filing a motion to dismiss the UA 37 application. Columbia Steel's motion did not request a hearing. Next, Columbia Steel filed a reply to PGE's response to Columbia Steel's motion. Columbia Steel's reply did not request a hearing. Later, Columbia Steel filed a memorandum supporting its motion to dismiss. The memorandum did not request a hearing. Those were the major documents Columbia Steel filed prior to the Commission issuing Order No. 92-557. A review of the pleadings, record, and file does not reveal requests for a hearing.

Even if Columbia Steel had requested a hearing, it agreed on the record that the documents filed in this proceeding constituted an adequate and sufficient record for the Commission's decisions. Order No. 92-557 was based on that record.

PGE's application in UA 37 is in three parts: a request that the Commission issue a declaratory ruling stating that

Commission Order No. 72-870 allocated exclusive territory to PGE within the City of Portland; a request that the Commission issue an order approving a 1972 agreement between PGE and Pacific Power & Light Company (PP&L) allocating service territory within the City of Portland; and, a request that the Commission allocate territory within the County of Portland based on years of continuous service. Columbia Steel filed a motion to dismiss the application, on the grounds that the Portland City Charter and state statutes prohibit territorial allocation within Portland, that the 1972 PGE/PP&L contract and the 1972 Commission allocation proceeding are an inadequate basis for an allocation, and that the Commission lacks authority to issue the requested declaratory order.

The Hearings Officer conducted two conferences on procedural matters. Columbia Steel was represented by counsel at both conferences. At the first conference, on August 8, 1990, counsel for PGE and the Commission's staff stated that they thought the disputes were primarily legal. Columbia Steel stated that its position was that the proceeding was not needed because the Commission lacked jurisdiction to allocate territory within the City of Portland. Counsel for Columbia Steel stated that Portland's City Charter and state statute prohibited territorial allocations within Portland. Columbia Steel's position was, of course, based on its interpretation of the law. The Hearings Officer asked the parties to discuss the issues and specifically to attempt to draft an agreed statement of facts to provide a framework upon which the legal issues could be decided.

At the start of the second conference, on December 19, 1991, the Hearings Officer asked the parties for a report on their negotiations. Staff counsel stated that extensive negotiations had occurred and the parties had agreed that the record was complete, no additional evidence was desired, and the matter was ready for decision (except for one issue not relevant here). Mountains of documents had been filed in pleadings and briefs, and the Hearings Officer took that

statement to mean that the information in those documents would form the basis for the Commission's decisions in all but one issue in the two dockets. So he summarized the major kinds of documents filed in the dockets and asked the parties for comments. Counsel for PGE responded that the parties had discussed in their negotiations whether to supplement the record and had agreed that the documents already filed were sufficient. The Hearings Officer asked if any party objected to the Commission basing its decisions on the documents already filed. No objection was voiced. Counsel for Columbia Steel did state that he did not want to stipulate that the utilities had faithfully provided exclusive service in the areas they claimed as theirs within Portland, because there may have been exceptions. The Commission in Order No. 92-557 declined to allocate territory on the basis of exclusive service by the utilities.

Columbia Steel's claim that it was denied an evidentiary hearing over its objections is without merit. The record on which Order No. 92-557 is based is adequate to rule on Columbia Steel's motion to dismiss and to make the decisions required by the applications in UA 37 and UA 41.

Other Issues.

Within the two principal reasons Columbia Steel gives for the requested reconsideration, Columbia Steel argues many other points. Most of them were considered and addressed in Order No. 92-557. Columbia Steel sent additional documents with its petition for reconsideration, many of which are copies of depositions of people who have opinions about events relating to the 1972 allocation order. In response, PGE also filed copies of depositions of people with knowledge of the 1972 allocation matters. The additional material does not show that Order No. 92-557 should be reconsidered or was in error.

IT IS ORDERED that the petition for reconsideration filed by Columbia Steel Casting Co., Inc., on June 15, 1992, is denied.

Made, entered and effective August 7, 1992.

/s/ _____
Ron Eachus
Chairman

/s/ _____
Joan H. Smith
Commissioner

_____
Roger Hamilton
Commissioner

A party may appeal this order pursuant to ORS 756.580.

APPENDIX O

APPENDIX O

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation,	) Case No. 92C-12005
Plaintiff,	) JUDGMENT AFFIRMING PUBLIC UTILITY COMMISSION OF OREGON ORDER NOS. 92-557 AND 92-1135
v.	
PUBLIC UTILITY COMMISSION OF OREGON,	[Entered February 16, 1993]
Defendant, and	
PORTLAND GENERAL ELECTRIC COMPANY, and PACIFICORP,	
Intervenor-Defendants.	

This case came before this Court pursuant an appeal by Columbia Steel Casting Company ("Columbia Steel"), the plaintiff, of two orders issued by the Public Utility Commission of Oregon ("OPUC"), Order Nos. 92-557 and 92-1135. Plaintiff, appearing through Michael C. Dotten and James L. Buchal of the law firm of Heller, Ehrman, White & McAuliffe, filed a complaint against the OPUC orders on October 6, 1992. The complaint alleges that the orders are unlawful because they violated plaintiff's due process rights, because the OPUC

exceeded its statutory powers, and because the orders were not supported by substantial evidence. Defendant, OPUC, appearing through its counsel, Paul A. Graham, of the Oregon Department of Justice, filed an answer on October 19, 1992 and a motion for summary judgment on October 28, 1992. Portland General Electric Company ("PGE"), appearing through Allan M. Garten of the law firm Tonkon, Torp, Galen, Marmaduke & Booth, intervened as a defendant, filed an answer and a memorandum in support of the OPUC's motion for summary judgment.

The OPUC and PGE, through their motion for summary judgment and supporting memoranda, asked the Court to affirm OPUC Order Nos. 92-557 and 92-1135 in all respects. The OPUC contends that the orders are supported by substantial evidence, are well within the OPUC's statutory powers, and did not violate plaintiff's due process rights. The OPUC's summary judgment motion also argues that no discovery should be permitted by Columbia Steel. PGE's memoranda supported the OPUC. Columbia Steel opposes the OPUC's motion for summary judgment, and argues that this case should proceed to trial.

The Court heard oral argument by the OPUC, PGE, and Columbia Steel on February 3, 1993. Based upon the arguments presented to the Court and the briefs submitted by all the parties on summary judgment, the Court finds that there are no genuine issues of material fact in dispute and that, consistent with the Court's previous rulings, this proceeding is in the nature of appeal and no evidence will be forthcoming. The Court further finds that OPUC Order Nos. 92-557 and 92-1135 are supported by substantial evidence and should be affirmed in all respects. Based upon the findings, it is therefore

ORDERED AND ADJUDGED that JUDGMENT be entered against plaintiff and for defendants, that summary judgment be granted to the OPUC and PGE, and that OPUC Order Nos. 92-557 and 92-1135 are affirmed in all respects.

DATED this 16 day of February, 1993.

/s/_____
RICHARD D. BARBER
CIRCUIT COURT JUDGE

APPENDIX P

APPENDIX P

FILED: December 15, 1993

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

COLUMBIA STEEL CASTING CO., INC.	)	
Appellant,	)	Marion County Circuit Court No. 92C-12005
v.	)	
PUBLIC UTILITY COMMISSION OF OREGON	)	CA A79041
Respondent,	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
Intervenor-Respondent	)	
and	)	
PACIFICORP,	)	
Intervenor below.	)	

Date argued or submitted on briefs: November 22, 1993

Before: Rossman, presiding Judge, and De Muniz and Leeson, Judges

Attorney for Apellant: Michael C. Dotten

Attorney for Responding Public Utility Commission:
Jas. Adams, Assistant Attorney General

Attorney for Intervenor-Respondent Portland General Electric Company: Allan M. Garten

AFFIRMED WITHOUT OPINION

APPENDIX Q

APPENDIX Q

IN THE SUPREME COURT OF THE
STATE OF OREGON

COLUMBIA STEEL CASTING CO., INC.	)	
Plaintiff-Appellant, Petitioner on Review	)	Marion County Circuit Court No. 92C-12005
v.	)	ORDER DENYING REVIEW
PUBLIC UTILITY COMMISSION OF OREGON,	)	CA A79041 SC S40990
Defendant-Respondent, Respondent on Review,	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
Intervenor-Respondent	)	
and	)	
PACIFICORP,	)	
Intervenor below.	)	

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 22nd day of March, 1994.

/S/
GEORGE A. VAN HOOMISSEN
PRESIDING JUSTICE

Gillette and Graber, JJ., not participating

APPENDIX R

APPENDIX R

Excerpts from Oregon Revised Statutes Chapters 757 and 758.

757.020. Duty of utilities to furnish adequate and safe service at reasonable rates.

Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited.

757.325. Undue preferences and prejudices.

(1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

(2) Any public utility violating this section is guilty of unjust discrimination.

757.480. Approval needed prior to disposal, mortgage or encumbrance of operative utility property or consolidation with another public utility.

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $10,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility; or

(b) Mortgage or otherwise encumber the whole or any part of the property of such public utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility; or

(c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any public utility property, or perform any service as a public utility, or any part thereof, with any other public utility.

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

(3) This section does not prohibit or invalidate the sale, lease or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public.

ALLOCATION OF TERRITORIES AND CUSTOMERS

758.400 Definitions for ORS 758.015 and 758.400 to 758.475. As used in ORS 758.015 and 758.400 to 758.475 unless the context requires otherwise:

(1) "Allocated territory" means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory.

(2) "Person" includes individuals, firms, partnerships, corporations, associations, cooperatives and municipalities, or their agent, lessee, trustee or referee.

(3) "Utility service" means service provided by any equipment, plant or facility for the distribution of electricity to users for the distribution of natural or manufactured gas to consumers through a connected and inter-related distribution

system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service.

758.405 Purpose of ORS 758.400 to 758.475. The elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services.

758.410 Contracts for allocation of territories and customers between suppliers of utility service and for transfer of facilities. (1) Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties; and the territories and customers so allocated and designated may include all or any portion of the territories and customers which are being served by either or both of the parties at the time the contract is entered into, or which could be economically served by the then existing facilities of either party, or by reasonable and economic extensions thereto.

(2) Any such contracting parties may also contract in writing for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of the allocation agreed upon pursuant to subsection (1) of this section. Any sale, exchange, transfer or lease of equipment, plant or facilities made pursuant to this subsection by any person which is a "public utility" as defined in ORS 757.005 is also subject

to the approval of the commission to the extent required by ORS chapter 757.

758.415 Contract enforceable if approved by commission; conditions for approval. Notwithstanding any other provisions of law, a contract entered into pursuant to ORS 758.410, when approved by the commission as provided in ORS 758.420 to 758.475, shall be valid and enforceable; provided, that the commission shall approve such a contract only if the commission finds, after a hearing as provided in ORS 758.420 to 758.475, that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby.

758.420 Filing of contract; hearing on approval; notice. (1) A contract entered into pursuant to ORS 758.410 shall be promptly filed with the commission, and the commission shall, within 30 days after such filing, give notice of such filing. If the commission chooses or if any customer or customers request a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of such hearing within 30 days of the customer's request which notice shall set the date and place of hearing on the question as to whether or not such contract will be approved. The hearing shall be held at a place within or conveniently accessible to the territories affected by the contract.

(2) The commission shall publish notice of the filing in a newspaper or newspapers of general circulation in each of the territories affected by the contract. Each such notice shall be published at least once weekly for two successive weeks.

758.425 Order of commission on contract; suit to vacate order. (1) On the basis of the applicant's filing or, if there is a hearing, on the record made at the hearing held pursuant to ORS 758.420, the commission shall enter an order either approving or disapproving the contract as filed, together with any appropriate findings of the facts supporting such order.

(2) Any party to such contract may commence a suit to vacate and set aside the commission's order on the ground that such order is unlawful, and so far as applicable and not inconsistent herewith, the provisions of ORS 756.580 to 756.610 shall govern such suit.

(3) If the commission approves a contract and no suit is filed to vacate or set aside the commission's order as above provided, the contract shall be deemed to be valid and enforceable for all purposes from the date on which the right to file such suit expires. If a suit to vacate or set aside the commission's order is filed, the validity of the contract shall be as determined by the final judgment therein rendered.

758.430 Amendment of contract; approval of commission. Any contract that has been approved as provided in ORS 758.400 to 758.475 may be subsequently amended by the parties thereto, but any such amendatory agreement shall be filed with the commission and shall thereafter be approved or disapproved by the commission in the manner provided in ORS 758.420 and 758.425. However, no hearing is required if all affected customers approve the amendatory agreement. An amendatory agreement may be enforced in the manner provided in ORS 758.465.

758.435 Application, by person providing exclusive utility service, for allocation of territory; hearing; notice. (1) Any person providing a utility service in a territory that is not served by another person providing a similar utility service may make application to the commission for an order allocating such territory to it. The application may include any adjacent area

that it is more economical and feasible to serve by an extension of the applicant's existing facilities than by an extension of the facilities of another person.

(2) The commission shall within 30 days after the filing of such application give notice of the filing. If the commission chooses, or if a customer requests a hearing on the matter within 30 days of the notice, the commission shall hold a hearing by telephone or in person. The commission shall give notice of the hearing within 30 days of the request which notice shall set the date and place of hearing. The hearing shall be held at a place within or conveniently accessible to the territory covered by the application. Notice of the filing shall be by publication in a newspaper or newspapers of general circulation in the territory covered by the application and shall be published at least once weekly for two successive weeks. Written notice of the filing shall be give to providers of similar utility service in adjacent territory.

(3) Territory within the limits of a city, as fixed on May 31, 1961, shall not be deemed to be served exclusively by any person, if such city is, on such date, served by more than one person having necessary municipal or franchise authority to serve within the entire city.

758.440 Order of commission on application. (1) On the basis of the application, or, if there is a hearing, on the record made at the hearing held pursuant to ORS 758.435, the commission shall enter an order either approving or disapproving the application as filed, or as amended, together with findings of the facts supporting such order.

(2) The commission, before approving an application for the allocation of territory, shall find that the applicant is exclusively serving the territory covered by the application and in the case of an adjacent unserved area that it is more economical and feasible to serve by an extension of the

applicant's existing facilities than by an extension of the facilities of another person.

758.445 Suit to vacate order on application. Any party to the hearing may commence a suit to vacate and set aside the commission's order as provided in ORS 756.580 to 756.610. If no suit is filed to vacate or set aside the commission's order within the specified time, the order shall thereafter be valid and enforceable for the purposes herein specified from the date on which the right to file such suit expires. If a suit to vacate or set aside the commission's order is filed, the validity of the order shall be determined by the final judgment therein provided.

758.450 Contract required for allocation of territory; allocated territory exclusive; activity prohibited during pendency of application; exception; third party financing.

(1) Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the commission.

(2) Except as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.

(3) Except as provided in subsection (4) of this section, during the pendency of any application for an allocation of exclusively served territory, no person other than applicant shall offer, construct or extend utility service in or into the territory applied for; nor shall any person, without the express consent of the commission, offer, construct or extend utility service in or into any unserved territory which is the subject of a filing pending before the commission under ORS 758.420 or 758.435.

(4) The provisions of ORS 758.400 to 758.475 do not apply to any corporation, company, individual or association of individuals providing heat, light or power:

(a) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to July 14, 1985;

(b) From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers;

(c) From solar or wind resources to any number of customers: or

(d) From biogas, waste heat or geothermal resources for nonelectric generation purposes to any number of customers.

(5) Nothing in subsection (4) of this section shall prohibit third party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

758.455 Investigation by commission respecting contracts or applications; hearing procedure. (1) The commission may make such investigations respecting a contract or an application for the allocation of territory as the commission deems proper including the physical examinations and evaluations of the facilities and systems of the parties to the contract, estimates of their operating costs and revenues and studies of such other information as the commission deems pertinent.

(2) Insofar as applicable and consistent herewith, the provisions of ORS 756.500 to 756.610 shall govern the conduct of hearings.

(3) In considering competing applications to serve the same territory, there shall be a disputable presumption that applicants have an equal ability to extend, improve, enlarge, build, operate and maintain existing or proposed facilities.

758.460 Assignment or transfer of rights acquired by allocation; approval of commission.

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest. However, no hearing is required if all affected customers agree to the proposed assignment or transfer.

(2) No approved contract or order approving an allocation of territory shall be construed to confer any property right; providing, however, upon the death of an individual who is a party to an approved contract or the applicant under an approved order, the executor or administrator shall continue the operation thereunder for the purpose of transferring such rights for a period of not to exceed two years from the date of death.

(3) In the event the property of a person serving an allocated territory is condemned, no value shall be claimed or awarded by reason of the contract or order making such allocation.

758.465 Enforcement procedure. In the event a contract approved by the commission is breached or in the event an allocated territory is served by a person not authorized by such contract, or order of the commission, the aggrieved person or the commission may file an action in the circuit court for any county in which is located some or all of the allocated territory allegedly involved in said breach or invasion. The trial of such action shall proceed as in an action not triable by right to a jury. Any party may appeal to the Court of Appeals from the court's decree, as in other equity cases. The remedy provided in this section shall be in addition to any other remedy provided by law.

758.470 Application to cities, municipalities and cooperatives of ORS 758.400 to 758.475.

(1) ORS 758.015 and 758.400 to 758.475 shall not be construed or applied to restrict the powers granted to cities to issue franchises, or to restrict the exercise of the power of condemnation by a municipality; and when a municipality has condemned or otherwise acquired another person's equipment, plant or facilities for rendering utility service, it shall acquire all of the rights of the person whose property is condemned to serve the territory served by the acquired properties.

(2) ORS 758.015 and 758.400 to 758.475 shall not be construed to restrict the right of a municipality to provide utility service for street lights, fire alarm systems, airports, buildings and other municipal installations regardless of their location.

(3) ORS 758.015 and 758.400 to 758.475 shall not be construed to confer upon the commission any regulatory authority over rates, service or financing of cooperatives or municipalities.

758.475 Fees. [Omitted]

APPENDIX S

APPENDIX S

AGREEMENT

THIS AGREEMENT made this 18th day of July, 1972, by and between PACIFIC POWER & LIGHT COMPANY, a Maine Corporation, hereinafter called "Pacific," and PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, hereinafter called "Portland General,"

WITNESSETH:

WHEREAS, Portland General and Pacific each own facilities and provide electric utility service within and around the City of Portland in areas shown on a map marked "Exhibit A: and more particularly described in "Exhibit B," which exhibits are attached hereto and made a part hereof; and

WHEREAS, Pacific provides electric utility service in and around Rainier, Oregon, within an area referred to in tariffs filed with the Public Utility Commissioner of Oregon as Pacific's Rainier District, which area is shown on Exhibit A an described in "Exhibit C," attached hereto and made a part hereof; and

WHEREAS, Portland General and Pacific wish to provide for the elimination of duplicating electric utility facilities in the foregoing areas; and

WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by Portland General and Pacific of certain properties located within the city;

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed:

1. Exchange of Facilities

(a) Pacific shall transfer and convey to Portland General and Portland General shall acquire from Pacific all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Pacific in the area designated as Pacific's Rainier service district, shown on Exhibit A and described in Exhibit C, and in the area designated as Parcel C, shown on Exhibit A and described in Exhibit B; excluding, however (1) facilities owned, operated and maintained by Pacific within an area commonly known as the Portland downtown core area, designated as Parcel D on Exhibit A, and described in Exhibit B, and (2) certain duct lines owned, operated and maintained by Pacific extending from Pacific's Albina substation to Pacific's facilities within the Portland downtown core area. Distribution substations to be conveyed by Pacific to Portland General are listed in "Exhibit D," attached hereto and made a part hereof.

(b) Portland General shall transfer and convey to Pacific and Pacific shall acquire from Portland General all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by Portland General in the areas designated as Parcels A and B, shown on Exhibit A and described in Exhibit B; excluding, however: (1) facilities describe under the streetlight plant account of the Uniform Systems of Account, except that lease area lights will be conveyed by Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General to Pacific; (2) certain duct lines owned, operated and maintained by Portland General extending from Portland General's Station L to Portland General's facilities within the Portland downtown core area; and (3) standard wood poles used exclusively for street lighting.

Distribution substations to be conveyed by Portland General to Pacific are listed in Exhibit D.

(c) Portland General shall transfer and convey to Pacific and Pacific shall transfer and convey to Portland General the transmission facilities described in "Exhibit E," attached here and made a part hereof.

(d) As a necessary part of the distribution and transmission substations and facilities exchanged hereunder and described in Exhibits D and E hereto, Portland General and Pacific shall convey to each other the fee interest or easements in the underlying real property on which exchanged facilities are located, including such adjacent property as is needed for the expansion of such substations and facilities; except that with respect to the 115 Kv transmission line extending from Knott Substation to Willamette Meridian to be acquired by Pacific hereunder (Exhibit E, Paragraph 2a), Portland General will retain the right to rebuild, at Portland General's expense, that portion of said line extending from Columbia Substation to Willamette Meridian and shall have joint use with Pacific of the present 50-foot right-of-way on which said line is erected for the purpose of providing an additional circuit; provided that the existing 115 Kv circuit or the equivalent thereof shall continue to be available to Pacific. Real property to be conveyed by Pacific to Portland General is shown on a series of property plats prepared by Pacific, collectively designated as "Exhibit G," attached hereto and made a part hereof. Real property to be conveyed by Portland General to Pacific is shown on a series of property plats prepared by Portland General, collectively designated as "Exhibit H," attached hereto and made a part hereof. Non-operating real property shall not be exchanged. However, Pacific's Rainier service center and a tract of land located in Rainier and presently used by Pacific as a pole yard shall be designated as operating property and conveyed to Portland General hereunder.

(e) After notice to Pacific, Portland General shall at its expense promptly disconnect from Pacific's system and connect to Portland General's system the electric distribution facilities located in Parcel C, shown in Exhibit A and described in Exhibit B, excepting, however, the following substations:

1. Woodstock
2. Holgate
3. Laurelhurst.

The disconnection and reconnection of facilities shall be performed in a manner such as to minimize any interruption of electric service to the customers served by Pacific from its said facilities. For the purposes hereof, the severance of facilities from Pacific's system and the connection of such facilities to Portland General's system shall be known as a cutover.

From the Date of Cutover to the Date of Conveyance, as hereinafter provided, Portland General shall be responsible for any maintenance, repair or replacement necessary to furnish electric service over said facilities.

(f) After notice to Portland General, Pacific shall at its expense promptly disconnect from Portland General's system and connect to Pacific's system the electric distribution facilities located in Parcels A and B, shown in Exhibit A and described in Exhibit B, excepting, however, the Russellville substation. The disconnection and reconnection of facilities shall be performed in a manner such as to minimize any interruption of electric service to the customers served by Portland General from its said facilities. For the purposes hereof, the severance of facilities form Portland General's system and the connection of such facilities to Pacific's system shall be known as a cutover.

From the Date of Cutover to the Date of Conveyance, as hereinafter provided, Pacific shall be responsible for any maintenance, repair or replacement necessary to furnish electric service over said facilities.

(g) The cutover of electric facilities from one system to that of the other party will necessarily take place over a period

of time. It is agreed that the cutover will be correlated so that maintenance of each other's facilities will be substantially equal in duration and extent. Cutover of facilities shall commence on or about July 24, 1972, and be completed on or before the Date of Conveyance. Neither party shall increase the transformer capacity connected to the other party's transmission at Woodstock, Holgate, Laurelhurst and Russellville Substations without the consent of the other party.

(h) Promptly after completion of cutover of all facilities, each party will provide to the other a tabulation by units of property of facilities exchanged, copies of distribution and transmission maps, and records necessary to record the property on the books of account of the receiving party.

(i) If equipment is leased to a customer and such customer transferred to the other party, the lease and payments thereunder shall be assigned to the party receiving the customer.

2. Transmission System Interconnections

Portland General and Pacific will establish on their transmission systems, at voltages of 57 Kv, 69 Kv and 115 Kv, such interconnections as may be necessary to provide for the proper operation and integrity of their respective transmission systems. The transmission system interconnections as are described more specifically in "Exhibit F," attached hereto and made a part hereof. Metering equipment required for such interconnections shall be installed as soon as practicable, and the cost hereof shall be shared equally, notwithstanding which party makes the actual installation. Energy transferred between the systems of each party shall be accounted for in accordance with paragraph 4 (a) hereof.

3. Distribution System Interconnections

(a) Portland General and Pacific shall provide on their respective distribution systems such interconnections as may be

necessary to provide for the proper operation of said systems until completion of all cutovers.

(b) Where necessary, meters shall be installed by and at the expense of the party receiving energy from the system of the other party. Energy transferred shall be accounted for in accordance with paragraph 4 (a) hereof.

(c) Unmetered interconnections shall be made and accounted for in accordance with a certain energy exchange agreement heretofore entered into by the parties hereto, dated December 21, 1971.

(d) It is the intent of this agreement that the number of such distribution system interconnections shall be held to a minimum and that all such interconnections shall be radial.

4. Energy Exchange

(a) Commencing with the date hereof, each party shall maintain a record of the amounts of power and energy delivered to the other party at the points of interconnection made in accordance with paragraphs 3 (a) and 3 (b). Each party will thereafter reimburse the other for amounts of power and energy so delivered and received, with a deduction adjustment of 5 percent for losses in amounts delivered. Amounts of power and energy so delivered and received shall be estimated in accordance with scheduling procedures existing between the parties, and adjustments made from time to time so that the scheduled replacement quantities after deduction for losses shall equal the measured energy delivered to each party at the points of interconnection.

(b) The transmission system interconnections described in paragraph 2 hereof shall be metered and telemetered as mutually agreed to by the parties, and interchanges at such interconnections shall be accounted for hourly as actual

interchange between the parties in accordance with normal existing scheduling procedures.

(c) In order to provide reliability to their customers, Portland General and Pacific shall during emergencies provide unmetered interconnections at points and locations to be determined by the operating department of both parties, the duration thereof to be held to a minimum. Energy transferred during such emergencies shall be accounted for in accordance with paragraph 4 (a) hereof.

5. Maintenance and Repair

Until cutover of facilities as provided herein, each party shall at its expense maintain and repair those facilities which it shall transfer to the other party.

6. Date of Conveyance

Unless required by regulatory authorities or changed by mutual agreement, the Date of Conveyance shall be not later than July 31, 1973. At such time, each party shall execute and deliver to the other a deed and bill of sale for the real and personal property conveyed and transferred in accordance herewith.

7. Transfer of Customer Accounts

The transfer of customer accounts between Portland General and Pacific shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. At the time of such transfer, each party shall make available to the other list of the transferred customers, together with accounting, billing service and historical sales records relating thereto. On the date of the transfer of customer accounts, each party will render a final bill to those customers

being transferred to the other party. Accounts receivable will be retained by the party issuing the final bill.

8. Taxes

Real and personal property taxes relating to the facilities conveyed shall be prorated between the parties as of the Date of Conveyance.

9. Mortgage Release

Pacific's said electric facilities are subject to the lien of Pacific's Mortgage and Deed of Trust to Morgan Guaranty Trust Company of New York (formerly Guaranty Trust Company of New York), Corporate Trustee, dated July 1, 1947, as amended and supplemented. Portland General's said electric facilities are subject to a mortgage and Deed of Trust held by the Marine Midland Bank - New York, Trustee, dated July 1, 1945, as amended and supplemented. Promptly after the Date of Conveyance, each party shall obtain and deliver to the other a release of such facilities from the lien of said Mortgages and Deeds of Trust.

10. Damage to Facilities

If for any cause said electric facilities, or any portions thereof, are entirely or substantially destroyed or seriously damaged prior to the Date of Cutover, and the owner thereof does not restore said facilities to substantially their former condition, the parties shall agree upon an equitable adjustment of such destruction or damage. If such destruction or damage to facilities shall be deemed the owner thereof and solely responsible for any restoration of said facilities that it elects to make.

11. Injury to Persons or Damage to Property of Others

Each party shall be liable for injuries to persons or damage to property of third parties arising out of its negligent actions or arising out of its operation and maintenance of facilities owned by the other party and described herein; and, further, the party operating and maintaining the facilities shall defend, indemnify and save harmless the owner hereof from any and all liabilities for damages and expenses, direct or consequential, on account of such personal injury or property damage. In the event such injury or damage is caused by the joint negligence of the parties, then the parties shall share equally the costs of damages and expenses on account of such injury or damages.

12. Employees

Employees of Pacific's Rainier District may at their election transfer to and become employees of Portland General. Compensation and other employee benefits received by these employees from Portland General will be made substantially equal to that being received from Pacific at the time of their transfer.

13. Assignment of Contractual and Other Rights

Portland General shall assign and transfer to Pacific and Pacific shall assign and transfer to Portland General, all contracts, agreements, easements, franchises, leases and any and all rights relating to the construction, maintenance, ownership and operation of the facilities and accounts to be transferred or conveyed thereunder except that no assignment shall be made of Pacific's franchise to operate in Portland.

14. Regulatory Approval

This agreement and the transfer of facilities pursuant thereto are subject to the approval of the Public Utility

Commission of Oregon and any other regulatory agency having jurisdiction over the parties hereto and the transactions herein provided for. Portland General and Pacific shall make such applications as are necessary to obtain the approval of this agreement and the transfer of property provided for herein.

15. Assignment

This agreement may not be assigned except with the prior written consent of the other party.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed in duplicate on the day and year herein-above first set forth.

PACIFIC POWER & LIGHT COMPANY
By /s/_____
A.C. Bartholomew
Senior Vice President

Attest:
/s/_____
Assistant Secretary

PORTLAND GENERAL ELECTRIC COMPANY

By /s/_____
Hilbert S. Johnson
Senior Vice President

Attest:
/s/_____
Asst. Secretary

Exhibit A Map of Areas Exchanged [omitted]

Exhibit B Boundary Descriptions of Parcels A, B, C and D

Exhibit C Boundary Description of Rainier Service District [omitted]

Exhibit D Distribution Substations to be Exchanged [omitted]

Exhibit E Transmission Facilities to be Exchanged [omitted]

Exhibit F Transmission System Interconnections [omitted]

Exhibit G Real Property Conveyed to Portland General [omitted]

Exhibit H Real Property Conveyed to Pacific [omitted]

EXHIBIT B

Service Areas
of
PORTLAND GENERAL ELECTRIC COMPANY
and
PACIFIC POWER & LIGHT COMPANY
Portland, Oregon

PARCEL A:

Beginning at the point of intersection of the South line of the North Portland Harbor with the centerline of the Pacific Highway . . . [continued metes and bounds description of parcel].

PARCEL B:

Beginning at the point of intersection of the extended centerline of S.W. Jefferson Street with the centerline of Pacific Highway . . . [continued metes and bounds description of parcel].

PARCEL C:

Beginning at a point on the Oregon-Washington State line and an extension of the east side of Sundial Ranch Road, . . . [continued metes and bounds description of parcel].

PARCEL D:

Beginning at a point on the center line of S.W. Market Street at its intersection with the center line of S.W. First Avenue; . . . [continued metes and bounds description of parcel].

APPENDIX T

APPENDIX T

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF 3074

In the Matter of the Suspension)
of Revised Tariff Schedules)
applicable to electric service in)
the State of Oregon filed by)
PACIFIC POWER & LIGHT)
COMPANY; on the)
Commissioner's own motion.)

[Excerpt of testimony of OPUC staff witness Evan White in the proceeding that led to Order No. 74-658, App. L]

TRANSCRIPT OF PROCEEDINGS
Volume XXIII
June 7, 1974

. . .

[Pacific's predecessor] maintained rates in Portland and Columbia County at a parity with Portland General Electric Company, and Pacific continued this practice after the merger. The Commissioner, in the past, has permitted Pacific to match rates of PGE partly because the two companies at one time competed with each other for customers and had overlapping service areas. Competition between the two utilities and the problem of overlapping service areas has since been resolved through exchanges of service territory, which were approved by the Commissioner. "Competition" can no longer be used to justify lower rates in Area P. [Portland].

APPENDIX U

APPENDIX U

[SEAL OF THE STATE OF OREGON]

DAVE FROHNMAYER
Attorney General

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Deputy Attorney General

DEPARTMENT OF JUSTICE
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April 16, 1990

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Portland, OR 97204

Benjamin Walters
Deputy City Attorney of Portland
1220 SW Fifth Avenue, Room 315
Portland, OR 97204

Gentlemen:

I am sending you some information dealing with the question of whether Pacific Power and Light may serve a customer located in the service territory of Portland General Electric Company.

I have enclosed the following:

1. Memorandum written by John H. Socolofsky to Ivan Gold, formerly Deputy Commissioner for the PUC. With respect to these memos, the members of the Commission have consented to waive the attorney/client privilege;

2. A copy of Order 72-870, which approved the current service arrangement in Portland between Pacific and PGE;

3. A copy of the Ordinance No. 134416 of the City of Portland, which approved the same arrangement; and

4. Copies of legislative history.

Mr. Socolofsky's memo sets forth what is still the Commission's position. The PUC believes that, first, ORS chapter 758 applies to Portland and second, that there has been an allocation of territory such that Pacific cannot offer service to a customer in PGE's territory.

With respect to whether ORS chapter 758 applies to Portland, our office reads ORS 758.435(3) as saying that a utility cannot claim to have exclusively served any territory in cities which franchised two or more utilities if the utility's claim is based on service rendered on or before May 31, 1961. It is nothing more than exception to the general rule in ORS 758.435(1), which allows a utility to ask for allocation of territory which it exclusively serves.

With respect to the question of whether there has been an allocation of territory, we read Order No. 72-870 to have made an allocation. Even though the order purports to be based upon ORS 757.480, the statute dealing with the sale of property, it

contains all the findings necessary to constitute an allocation of service territory within Portland to Pacific and to PGE.

Sincerely,
/s/ Paul A. Graham
Assistant Attorney General
Public Utility Section

PAG:dp:smi/5579G
Enclosures